Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

MARGARET HEBERT JACKSON, DIANE ARTHUR, CONSOLIDATED WITH BARBARA ARTHUR, MARY KING HILL, ET AL.,

Petitioners,

vs.

ZAPATA HAYNIE CORPORATION, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The Third Circuit Court Of Appeals For The State of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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165 pp

I.
QUESTIONS PRESENTED

A.

Where Congress has provided ONLY shipowners (or charterers) of vessels are entitled to limitation/exoneration of liability can a court by using procedural devices (res judicata) extend such substantive entitlement to marine protection and indemnity insurers.

B.

Did the Louisiana Third Circuit Court of Appeals properly apply federal res judicata procedural rules to petitioners' direct action suit.

II.

LIST OF PARTIES

In all three cases the defendants-respondents are Certain Underwriters at Lloyds, London and Abu Dhabi National Insurance Company, London, England and their insured, Zapata Haynie Corporation, a subsidiary of Zapata Corporation, One Ridgeway, P. O. Box 4240, Houston, Texas.

In the Diane Arthur case, plaintiffs are Diane Arthur as natural tutrix of the minor, Thomas Douglas Arthur; and Barbara Arthur, individually and as personal representative of the estate of Francis Douglas Arthur, Jr., and Angela Marie Arthur Daley.

In the Margaret Hebert Jackson case, plaintiffs are Margaret Hebert Jackson, individually and as personal representative of the estate of John Franklin Jackson and as natural tutrix of Victoria Marie Jackson and Gerald Jerome Jackson.

In the Mary King Hill case, plaintiffs are Mary King Hill, individually and as personal representative of the estate of Robert Hill, Jr.

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PETITION FOR WRIT OF CERTIORARI

Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Louisiana Third Circuit Court of Appeals dated January 22, 1997, which became final when petitioners' timely applications for writs of certiorari and/or review were denied by the Louisiana Supreme Court on May 30, 1997.

IV.

OPINIONS BELOW AND PARTIES

The decision of the Louisiana Third Circuit Court of Appeals is reported as follows:

(a) *Diane Arthur, et al, v. Zapata Haynie Corporation, et al,* No. 95-956, 690 So.2d 86, writ denied by Louisiana Supreme Court, 97-C-1031 ___ So.2d ___.

(b) *Mary King Hill, et al, v. Zapata Haynie Corporation, et al,* No. 95-957, 690 So.2d 91, writ denied by Louisiana Supreme Court, 97-C-1018, ___ So.2d ___.

(c) *Margaret Hebert Jackson, et al, v. Zapata Haynie Corporation, et al,* No. 95-958, 690 So.2d 90, writ denied by Louisiana Supreme Court, 97-C-1061, ___ So.2d ___.

V.

BASIS FOR JURISDICTION

The judgment of the Louisiana Third Circuit Court of Appeals dated January 22, 1997, became final on May 30,

1997, when the Louisiana Supreme Court denied petitioners applications for writs of certiorari and/or review. This Court has jurisdiction to review the final judgment of a state court of appeals pursuant to 28 U.S.C. § 1257(a).

VI.

THE STATUTES INVOLVED

This application involves 46 U.S.C. § 181-189, Limitation of Liability Act (Shipowners);[1] and Rule F of Supplemental Rules for certain admiralty and maritime claims.[2] Both are quoted in appendix.

VII.

STATEMENT OF THE CASE

THE ALLISION

Petitioners are survivors of menhaden fishermen lost at sea on October 3, 1989, in the Gulf of Mexico, while members of the crew of **F/V NORTHUMBERLAND,** when it struck and ruptured a submerged natural gas pipeline while fishing in shallow water off the coast of Texas; caught fire and sank. Since the vessel was engulfed from the stern, Engineer Arthur, trapped in the aft engine room, burned to death by gas-fueled fire. All other crew members jumped overboard. The captain and pilot survived because they could swim. All the remaining seamen from a crew of fourteen, except one who was

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[1] See App. p. 77-104.

[2] See App. p. 104-110.

wearing a life vest, drowned . . . because they never learned to swim.

Zapata Haynie Corporation, vessel owner and employer, had no rule like Sea Scouts requiring non-swimmers to at all times wear life vests.

SHIPOWNER RUSHES TO THE COURTHOUSE

Seven days later, on October 10, 1989, Zapata Haynie Corporation filed suit in the United States District Court for the Western District of Louisiana, seeking relief as vessel *owner* under the Limitation of Vessel Owner Liability Act, 46 U.S.C. § 181-195 of exoneration and/or limitation of liability to the value of the vessel at the end of the voyage (i.e. $10,000). The District Court issued a stay of all actions against *Zapata Haynie* and ordered applicants and others (including Natural Gas Pipeline Company of America ("NGPL"), owner of the pipeline), pursuant to Rule F of Supplemental Rules for Certain Admiralty and Maritime Claims, to file any claims *in that proceeding*. Petitioners/survivors complied with the federal court order and filed claims in Zapata's Limitation proceeding.

On June 26, 1990, petitioners/survivors filed suit in the 38th Judicial District Court for Cameron Parish, Louisiana, against Zapata Haynie Corporation, vessel owner and employer of decedents, stating a claim under the Jones Act (46 U.S.C. § 688) and general maritime law, and praying for *trial by jury*. On September 25, 1990, petitioners/survivors amended their original state court petition, stating a Louisiana Direct Action (L.R.S. 22:655)

claim against Abu Dhabi National Insurance Company and Certain Underwriters at Lloyd's London, Protection and Indemnity insurers of the vessel and its owner.

On March 18, 1991, in Monroe, Louisiana, the U. S. District Court, began a non-jury trial of Zapata's Limitation proceeding, which was consolidated with pending *separate* federal court suits filed by Zapata and NGPL against each other. This was an admiralty limitation proceeding under Rule 9(h) with no right to jury trial. *Zapata's insurers were not parties to this proceeding.* Petitioners/survivors' *separate* lawsuits against Zapata *and its insurers* were pending, as above set forth, in *state court* and not tried in this Federal Limitation proceeding.

A long way from home in a non-jury trial, petitioners/survivors fought Zapata Haynie claims that it be *exonerated* (pay nothing) or *limited* (pay $10,000). U.S. Judge Donald E. Walter said, "Zapata Haynie was no way at fault". . . . "NGPL was 100% at fault for the accident" and granted Zapata's petition for exoneration. Stay of the state court proceeding against Zapata Haynie *only* (not its insurers) was made permanent. On appeal, the U. S. Fifth Circuit Court of Appeals affirmed.[3]

RAISING THE FEDERAL QUESTIONS BELOW

In response to petitioners/survivors' move to proceed to trial in state court against insurers only, insurers filed an exception of res judicata, saying the federal

[3] See *Zapata Haynie Corporation v. Arthur*, 980 F.2d 287 (5th Cir. 1992), 1993 AMC 1113.

Zapata Limitation proceeding bars petitioners/survivors' state court Louisiana Direct Action claim.

The state trial court[4] sustained the insurer's res judicata plea and petitioners/survivors timely appealed. The Third Circuit Court of Appeals affirmed[5] saying:

> After Zapata Haynie was found to be without fault in causing the accident, its insurers filed an exception of res judicata in the state court action, contending, among other things, that the plaintiffs' claims against them under the Louisiana Direct Action Statute, La.R.S. 22:655, were barred by res judicata because the federal court had exonerated their insured, Zapata Haynie, from liability. The trial court agreed that the claims were barred by res judicata and granted the insurers' exception.
>
> **OPINION**
>
> The plaintiffs first argue that the federal court's exoneration of Zapata Haynie does not preclude their claim under La.R.S. 22:655, the Louisiana Direct Action Statute, because a shipowner's right to limit its liability under the Limitation of Vessel Owner's Liability Act is personal to the shipowner. In support of their position, the plaintiffs cite *Danzy v. U. S. Fidelity & Guaranty Co.*, 380 So.2d 1356, 1359 n.5 (La.1980) [quoting *Gustafson v. Peck*, 216 F.Supp. 370, 372-73 (N.D.Iowa 1963)], wherein the Louisiana Supreme Court stated:

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[4] See App. p. 1-9 for full opinion.

[5] See App. p. 10-17 for full opinion.

This court has long held that where an immunity from suit is merely personal, an insurer is not entitled to plead such immunity as a defense to a suit brought under the Direct Action Statute. *Edwards v. Royal Indemnity Co.*, 182 La. 171, 161 So. 191 (1935); Comment, the Louisiana Direct Action Statute, 22 La.L.Rev. 243 (1961). In *Edwards* the court made the following observation concerning the intent of the legislature in providing for a direct action against the insurer: "It is, therefore, our opinion that the Legislature intended to give the insurer the right to plead defenses which it could urge against the insured, but not defenses which are purely personal between the insured and claimant, and in no way growing out of, or connected with, the accident or policy." 182 La. at 181, 161 So. at 195.

The statutory basis for this doctrine is found in C.C. 2098, which concerns suit against a codebtor in solido, the status occupied by an insurer vis-a-vis its insured, and which provides that the codebtor 'can not plead such exceptions as are merely personal to some of the other codebtors.'

The following forms of immunity from suit have been found to be merely personal to an insured and therefore unavailable to the insurer: interspousal immunity, *Edwards v. Royalty Indemnity Co.*, supra, *LeBlanc v. New Amsterdam Cas. Co.*, 202 La. 857, 13 So.2d 245 (1943); father-son immunity, *Deshotel v. Travelers Indemnity Co.*, 257 La. 567, 243 So.2d 259 (1971); governmental immunity, *Snell v. Stein*, 261 La. 358, 259 So.2d 876

> (1972); charitable immunity, *Lusk v. U. S. Fidelity & Guaranty Co.*, 199 So. 666 (La.App.Orl.1941); an insane person's incapacity to be liable for his torts, *von Dameck v. St. Paul Fire & Marine Ins. Co.*, 361 So.2d 283 (La.App. 1978) [writs denied, 362 So.2d 794, 802 (La.1978)]. In a case similar to the one before us, to the extent that it necessitated reconciling the immunity granted to shipowners by the Federal Limitation of Liability Act, 46 U.S.C. §183(a) with the Louisiana Direct Action Statute, the United States Fifth Circuit Court of Appeals found that because the statutory right to limit liability is personal to the shipowner, it does not preclude a direct action against its insurer. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), cert. den. 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970).

However, in each of the situations recognized by the supreme court, the immunities merely erected a *procedural bar* to asserting the cause of action but did not *eliminate* the underlying cause of action. The case before this court is distinguishable from those procedural immunity situations in that the federal court judgment has eliminated the underlying cause of action against Zapata Haynie. Therefore, we find that Zapata Haynie's insurers are not precluded from asserting their claim to res judicata.

The Louisiana Third Circuit Court of Appeals then applied federal res judicata saying:

> However, it is the broader res judicata definition of the federal courts that is applicable to this matter.

> When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied.

Tye v. Co-Mar Offshore Operators, Inc., 950094 p. 3 (La.App.1 Cir. 10/6/95); 669 So.2d 438, 439, writ denied, 96-1051 (La. 6/7/96); 674 So.2d 975 (citation omitted).

For a federal court judgment to bar a subsequent suit under federal res judicata principals, it must meet four tests: (1) both cases must involve the same parties; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the prior judgment must have been a final judgment on the merits; and (4) the cause of action at issue must have been the same in both cases. *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, 95-0671 (La. 1/16/96); 666 So.2d 624.

The plaintiffs acknowledge that the elements of res judicata have been satisfied as to any claims against Zapata Haynie but argue that the elements have not been satisfied as to the insurers because the identity of the parties is not the same. However, for the purposes of res judicata, the Louisiana Supreme Court has determined that "[t]here exists an identity of the parties whenever the same parties, their successors, or others appear so long as they share the same 'quality' as parties." *Welch*, 359 So.2d at 156. This court in *Hannie v. Wall*, 569 So.2d 1044, 1050 (La.App. 3 Cir. 1990), *writ not considered, not timely filed*, 573 So.2d 1116 (La.1991), declared, "the insured and the insurer not only share the same quality as parties, but in essence

their identities are virtually merged into one, to the extent of the policy limits." (Citations omitted). Thus, permitting the plaintiffs to proceed against Zapata Haynie's insurers under the direct action statute would result in relitigating the issue of Zapata Haynie's liability in the accident. This is barred by res judicata. See also *Foster v. Hampton,* 352 So.2d 197 (La.1977); *Cornish v. Freeman,* 451 So.2d 148 (La.App. 1 Cir.), *writ denied,* 458 So.2d 476 (La.1984).

VIII.

MAY IT PLEASE THE COURT:

ARGUMENT

COLLISION OF LIMITATION OF LIABILITY AND DIRECT ACTION

In 1851 Congress enacted the Limitation of Liability Act providing for limitation of "the liability of the *owner of any vessel. . . .* "[6] or "the charterer[7] of any vessel. . . . "

Congress clearly did not afford such rights to insurers. However since the usual policy is written to indemnify vessel owners up to but not beyond the assured's legal liability, protection and indemnity (P & I) insurers have enjoyed *indirect benefits* from the limitation statute.

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[6] 46 U.S.C. § 183.

[7] 46 U.S.C. § 186.

On the other hand, in Louisiana and Puerto Rico there is a statutory[8] right to maintain a direct action for damages against the insurance company in addition to the insured, thereby eliminating insurers "indirect benefit" from the shipowners limitation statute.

Tension followed from collision of these two statutes brought about by P & I insurers' efforts to extend the Shipowners Liability Act to underwriters.[9]

This court calmed the disputed waters in *Maryland Casualty Company v. Cushing*, 347 U.S. 409, 745 S.Ct. 608, 98 L.Ed. 806, 1954 AMC 837 (1954), a direct action case, deciding the Louisiana Direct Action Statute controlled and the public policies therein provided the correct measure of recovery against the insurer of a vessel involved in a maritime accident regardless of any type limitation of liability afforded the owner (charterer) by the Limitation of Liability Act, i.e., a valid state regulation of insurance.

The U. S. Fifth Circuit in *Olympic Towing Corp. v. Nebel Towing Company*, 419 F.2d 230 (5th Cir. 1969), cert.

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[8] La.R.S. 22.655 provides:

"B.(1) The injured person shall have a right of action . . . against the insured and insurer . . . "

Louisiana courts hold the statute applies to marine P & I insurers regardless of whether the policy is framed in liability or indemnity terms. *Holtzclaw v. Falco*, 355 So.2d 1279 (La. 1977), *Quinlan v. Liberty Bank & Trust Co.*, 575 So.2d 336 (La. 1990); *Grannouleas v. Phoenix Maritime Agencies*, 621 So.2d 1131 (La. App. 1st Cir. 1993).

[9] See App. p. 111-143. A scholarly analysis of the Limitation Act by Chester D. Hooper, entitled *Limitation of Liability and the Direct Action Statute: A troubled Marriage*. 55 La. Law Review 843-860.

denied, 397 U.S. 989, 90 S.Ct. 1120, a direct action case, followed this court's direction in *Cushing*, supra, holding since in a direct action case the P & I underwriter may not invoke a shipowner's statutory right to limit, the insurer can be liable for damages in excess of the obligations of the shipowner resulting from a limitation proceeding . . . saying the right to limit *was a defense personal to the ship owner* and not available to insurers.

In *Crown Zellerbach Corp. v. Ingram Industries*, 783 F.2d 1296, 1986 AMC 1471 (5th Cir. 1986) (en banc), another direct action case, the Fifth Circuit opened the door to an insurer whose marine P & I club policy had a special clause saying:

> When a Member for whose account a ship is entered in this Class, is entitled to limit his liability, the liability of the Class shall not exceed the amount of such limitation . . .

The *Crown Zellerbach* court then reduced the insurers liability to that of the shipowner in the limitation proceeding.

But here the policies[10] issued to Zapata Haynie Corporation have no *Crown Zellerbach clause*. Thus under *Cushing* supra, and *Olympic Towing*, supra, the Third Circuit Court of Appeals should have held in petitioners/survivors state court direct action suit the Zapata limitation/exoneration trial in United States district court was a *defense personal to the shipowner* and not available to insurers because the congressional act extended limitation/exoneration entitlement only to shipowners.

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[10] See App. p. 27-76.

Thus the Louisiana Third Circuit Court of Appeals should have never reached the procedural doctrine of res judicata.

ANALYSIS OF LOUISIANA THIRD CIRCUIT COURT OF APPEALS ERROR ON RES JUDICATA

Preface

The Louisiana Third Circuit Court of Appeals held the federal res judicata rule applied and correctly stated it as follows:

> For a federal court judgment to bar a subsequent suit under federal res judicata principals, it must meet four tests: (1) *both cases must involve the same parties;* (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the prior judgment must have been a final judgment on the merits; and (4) *the cause of action at issue must have been the same in both cases.*

The Cause of Action is Not the Same[11]

The Jones Act (46 U.S.C. 688) provides:

> . . . in case of death of any seaman . . . the personal representative . . . may maintain an action for damages at law with the *right of trial by jury* . . .

---

[11] Jones Act jury trial in survivors choice of forum vis-a-vis non jury trial in shipowners choice of forum.

A Jones Act case filed in state court is not removable. *Azzopardi v. Ocean Drilling & Exploration Company,* 742 F.2d 890 C.A.5 (Tex.) 1984; *Kattleman v. Otis Engineering Corp.,* 701 F.Supp. 560 (E.D.La. 1988); *Lonthier v. Northwest Ins. Co.,* 599 F.Supp. 963 (D.C.La. 1985).

Thus, families of deceased seamen have long enjoyed under the Louisiana Direct Action Statute the right to (1) choose the forum, and (2) get a jury. In this case, Zapata's insurers by use of the Limitation/Exoneration statute have deprived the families of those important substantive rights and thus defeated their claims.

There is no Identity of Parties[12]

We have no quarrel with the Louisiana principle of insurance law found in *Hannie v. Wall,* 569 So.2d 1044 (La.App. 3 Cir. 1990) and other cases cited in the Third Circuit's opinion holding res judicata applies when "the insured and the insurer not only share the *same quality as parties,* but in essence their identities are virtually merged into one to the extent of the policy limits." *Same quality as parties* means the insured and insurer both qualify as parties to the proceeding[13] which forms a basis for the res judicata plea.

But Congress said only the *owner* can be a party to a limitation action! Brought only by the owner, it's purpose is to decide whether the *owner* (only) can *limit* or be *exonerated* from liability! Thus there is no "identity of

---

[12] Both cases must involve the same parties.

[13] Here it would be the Zapata limitation proceeding in Monroe, Louisiana.

parties" because Congress since 1851 has declined to extend entitlements under the Limitation Act to insurers.

CONCLUSION

In *Miles v. Apex Marine*, 111 S.Ct. 317, 49 U.S. 19, 112 L.Ed.2d 275, 1991 AMC 1 (1990), Justice O'Connor dealing with admiralty and "cognizant of the constitutional relationship between the courts and Congress," said:

> Respondents argued that admiralty courts have traditionally undertaken to supplement maritime statutes. The Court's answer in *Higginbotham* is fully consistent with those principles we have here derived from *Moragne*: Congress has spoken directly to the question of recoverable damages on the high seas, and "when it does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless." *Higginbotham*, supra, 436 U.S. at 625, 1978 AMC at 1065. *Moragne* involved gap-filling in an area left open by statute; supplementation was entirely appropriate. But in an "area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Higginbotham*, supra, 436 U.S. at 625, 1978 AMC at 1065.

Here since Congress has clearly and "directly" said limitation/exoneration is only for vessel owners (charterers), the Louisiana Third Circuit Court of Appeals is not free to extend such entitlement to insurance companies.

Only Congress can do this!

We ask this Honorable Court to grant writs, overrule the Third Circuit Court of Appeals of Louisiana and remand to the Thirty-Eighth Judicial District Court for Cameron Parish, Louisiana for trial on the merits.

Respectfully submitted,

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APPENDIX

DIANE ARTHUR, ET AL	:	38TH JUDICIAL
VS. NO. 10-12275	:	DISTRICT COURT
ZAPATA HAYNIE CORPORATION, ET AL	:	PARISH OF CAMERON
	:	STATE OF LOUISIANA

CONSOLIDATED WITH:

BARBARA ARTHUR, ET AL	:	38TH JUDICIAL
	:	DISTRICT COURT
VS. NO. 10-12001 ZAPATA HAYNIE	:	PARISH OF CAMERON
CORPORATION, ET AL	:	STATE OF LOUISIANA

CONSOLIDATED WITH:

MARGARET JACKSON, ET AL	:	38TH JUDICIAL
	:	DISTRICT COURT
VS. NO. 10-12277 ZAPATA HAYNIE	:	PARISH OF CAMERON
CORPORATION, ET AL	:	STATE OF LOUISIANA

CONSOLIDATED WITH:

MARY KING-HILL, ET AL	:	38TH JUDICIAL
	:	DISTRICT COURT
VS. NO. 10-12276 ZAPATA HAYNIE	:	PARISH OF CAMERON
CORPORATION, ET AL	:	STATE OF LOUISIANA

FONTENOT, JUDGE

On October 3, 1989 the F/V Northumberland, a menhaden fishing vessel, was in the Gulf of Mexico off of the coast of Texas when its propellor struck a natural gas pipeline resulting in an explosion and fire. The accident

caused the death of eleven crew members and injuries to others.

Claims for the losses were filed in the 38th Judicial District Court, Cameron Parish, Louisiana, against the vessel owner and employer of the crew, Zapata Haynie Corporation ("Zapata") as well as against the pipeline owner, Natural Gas Pipeline Company of America.

On October 10, 1989, a petition was filed by Zapata for exoneration from the accident or for a limitation of its liability for the accident in the United States District Court, Western District of Louisiana. The petition asked that notice issue to all of the crew members or to the legal representatives of the decedents. A trial on the petition was conducted in the U.S. District Court and Zapata was exonerated on a finding by the District Judge that Zapata was not at fault for the accident or resulting injuries.

Plaintiffs in the state action have now supplemented and amended their petition to name the underwriters of Zapata as defendants pursuant to the Louisiana Direct Action Statute. The amended petition has been met by exceptions of res judicata and no cause of action.

RES JUDICATA

The judgment of the U.S. District Court exonerating Zapata precludes the plaintiffs herein from pursuing their original petition against that defendant. That judgment is final and binding and to that extent, there is no argument. The question presented to the court on this exception is whether the underwriters of Zapata may avail themselves of the U.S. District Court judgment.

APPLICABLE LAW

The doctrine of res judicata is currently embodied in LSA-R.S. 13:4231. That statute prior to its amendment by Louisiana Acts 1990, Number 521, Section 1, would be controlling on this question because the act making the amendments provided specifically as to the effective date of the revision:

> "This act shall become effective January 1, 1991, and shall apply to all civil actions filed on or before January 1, 1991. The preclusive effect and authority of a judgment rendered in an action filed before the effective date of this act shall be determined by the law in effect prior to January 1, 1991."

The petition for limitation of liability was filed before January 1, 1991 and, hence, its effect should be determined by reference to the earlier law.

That statute, prior to its amendment, read as follows:

> "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

The object of the judgment sought in this case is to recover losses resulting from the negligence of Zapata Haynie Corporation as authorized by the Jones Act. It was on this same standard of negligence that Zapata was adjudicated to be free from fault. That was the "object of the judgment" as contemplated by LSA-R.S. 13:4231. Yet, it is plaintiff's position herein that they should be entitled

to re-litigate this issue. The various arguments in support of this will be dealt with separately.

ZAPATA'S DEFENSE IS PERSONAL

In the case of Olympia Towing Corporation v. Nebel Towing Company, 419 F.2d 230 (5th Cir. 1969), a Federal Court held that on a claim brought under the Louisiana Direct Action Statute, the defense of limitation was personal and available only to the vessel owner. Apart from the fact that *Nebel Towing* was dealing with the effect of a limitation and not an exoneration, its authority was expressly overruled in the case of Crown Zellerbach Corporation v. Ingram Industries, 783 F.2d 1296 (5th Cir.1986) ("Crown II"). That court gave a detailed analysis of personal defenses which under Louisiana Law cannot be asserted by an insurer. Suffice it to say, the court identified defenses such as infancy, charitable immunity, and governmental immunity as defenses which were personal. The court went on to explain that all persons in a protected class possess the defense whereas vessel owners are not a class which share some immunity as a group. Limitation of liability is granted to individuals on the basis of certain circumstances which have to be established judicially. Limitation is not available for all owners for all liabilities. And, *a fortiori*, an exoneration is a specific finding by a Federal Court before the question of limitation is even reached. This court finds the reasoning of *Crown II* to be a correct application of Louisiana law.

IDENTITY OF PARTIES

Traditionally, the application of res judicata in Louisiana was applied in a three part test. Often quoted is the Louisiana Supreme Court as follows:

> "Louisiana legislative authority for res judicata establishes a presumption of correctness and precludes relitigation of the object of the judgment only when there is (1) an identity of the parties, (2) an identity of "cause" and (3) an identity of the thing demanded. C.C. 2285-2287, 3556(31)." Welch v. Crown Zellerbach Corp., 359 So.2d 154, 156 (La. 1978).

It is conceded that the same cause of action and the same demand were at issue in the limitation proceeding. It is strenuously argued that because the underwriters were not named parties in the limitation proceeding that a strict construction of the Louisiana statute would dictate that the defense is not available to the underwriters.

This argument has been addressed by Louisiana Courts in several settings when the argument has been raised against an insurer whose insured has been the party litigant. As the court said in Cornish v. Freeman, 451 So.2d 148 (La.App. 1st Cir 1984), an insurer has no independent identity as regards the finding of fault on the part of its insured. "We find that under the circumstances, not only do [the insurer and insured] 'share the same quality as parties,' but in essence their identities are virtually merged into one." *Id.* at 148, 151.

In the case of Ditch v. Finklestein, 399 So.2d 121 (La.App. 3rd 1981), the court there, in discussing the identity issue, said that the requirement in res judicata of

identity of parties is met if there is identity in the legal sense of the word. A defendant whose liability is derivative from another is protected by res judicata if the other was a litigant and is bound by the action. As the court explained in *Crown II*, the direct action statute does not create a separate cause of action against an insurance company. There must be a legal liability on the part of the assured for the insurer to have direct action liability. *Crown II* at 1296.

The doctrine of res judicata is intended to avoid the re-litigation of the same issue. Whether Zapata Haynie Corporation was the plaintiff as in the limitation action or the named tortfeasor as in the amended petition before the court, the fault of Zapata Haynie Corporation is the issue to be relitigated and this is what the doctrine of res judicata is designed to avoid. McGowan v. Ramey, 484 So.2d, 785 (La.App. 1st Cir. 1986).

PUBLIC POLICY

Plaintiffs point out that the effect of res judicata in this case would be to deny a seaman his right to a jury trial against his ship owner-employer. That is true. But, it is an anomaly embodied in the controlling federal legislation. The Jones Act giving the seaman the right to a jury trial in state courts and the Limitation of Liability Act are both parts of a federal scheme. What the federal government giveth, it can taketh away. The recent decision by the Louisiana Supreme Court in Grubbs v. Gulf International Marine, Inc., 625 So.2d 495 (La. 1993), enabling direct action against underwriters of marine protection

and indemity [sic] policies, could not change the relationship of the federal actions, one to the other. An exonerated shipowner/employer has always been able to avoid a Jones Act jury trial with a successful limitation proceeding. If this is inequitable, it is a problem to be addressed by Congress.

NO CAUSE OF ACTION

In addition to Zapata Haynie Corporation, the original petition listed the captain of the vessel, Wayne Gough, as a party defendant. On summary judgment, this court had earlier dismissed the plaintiffs' claim against Gough because of the maritime fellow servant rule.

Captain Gough was not a party to the limitation of liability proceeding nor could he have been since he was not a vessel owner, and, hence, he was not exonerated. Consequently, he cannot raise the exception of res judicata. Because the captain is an omnibus insured under the policies, an exception of no cause of action is raised to the amending petition.

The dismissal of Captain Gough from this action was based on traditional and accepted maritime law. In The Osceola, 111 S.Ct. 808 (1903), the U.S. Supreme Court held that the general maritime law allowed a seaman to recover maintenance and cure wages and damages resulting from unseaworthiness but held that there was no general maritime negligence remedy available. The opinion read:

> " . . . the law may be considered as settled . . . that the seaman is not allowed an

> indemnity for the negligence of the master, or any member of the crew . . . "

The Jones Act extended the common law remedy of personal injury to seamen against vessel employers and owners but did not extend the remedy against fellow seamen. Again, the plaintiffs herein argue that the bar against suit by the crew against Captain Gough is a personal immunity and should not be extended to the insurance companies. While recognizing the analogy that under the Louisiana Workmen's Compensation Statute, an insurer may avail itself of the prohibition against negligent suits against co-employees, the plaintiffs herein attempt to make a distinction. It is offered that the immunity in Louisiana is statutory whereas the bar to suit by maritime co-workers is jurisprudential. This argument is not convincing. To the contrary, it is settled that there was no maritime action for negligence by one member of a crew against fellow members. Chelentis v. Luckenback S.S.Co., 243 F. 536 (2nd Cir. 1917), aff. 247 US 372 (1918). The Jones Act created an action for damages at law. Without repeating the examples cited earlier in this opinion, this immunity from suit of the fellow servant rule bears no resemblance to the list of personal immunities as discussed earlier. The defensive tort immunity under the workmen's compensation statute or under the general maritime law is not personal to the immune party. Dauzat v. State Farm Insurance Company, 473 So.2d 920 (La.App. 3d Cir. 1985).

For these reasons, the peremptory exceptions of res judicata and no cause of action are upheld.

SUMMARY JUDGMENT

Counsel requested that the court rule on the motion for summary judgment also before the court. It is the opinion of the court that material facts are in dispute and the motion for summary judgment is denied.

JUDGMENT

A judgment dismissing the amending and supplemental petition pursuant to the opinion of the court will be signed upon presentation.

Cameron, Louisiana

March 10, 1995

/s/ H. Ward Fontenot
H. WARD FONTENOT,
DISTRICT JUDGE

NUMBER 95-956

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

DIANE ARTHUR
Plaintiff-Appellant

VERSUS

ZAPATA HAYNIE CORPORATION, ET AL.
Defendants-Appellees

CONSOLIDATED WITH:

BARBARA ARTHUR, ET AL.
Plaintiffs-Appellants

VERSUS

ZAPATA HAYNIE CORPORATION, ET AL.
Defendants-Appellees

On appeal from the Thirty-Eighth Judicial District Court, Parish of Cameron, State of Louisiana, the Honorable H. Ward Fontenot, District Judge, presiding.

BEFORE: DOUCET, C.J.; COOKS; WOODARD; DECUIR; AND PETERS, Judges

PETERS, J.

The plaintiffs in this wrongful death action appeal the trial court's decision that the doctrine of res judicata precludes their suit in state court against the insurers of a marine vessel after the insured/owner of the vessel has been exonerated from liability in a federal court proceeding. For the following reasons, we affirm the trial court's decision.

FACTS

On October 3, 1989, the F/V Northumberland, a fishing vessel owned by Zapata Haynie Corporation (Zapata Haynie), struck and ruptured a submerged natural gas pipeline off the coast of Texas. Natural Gas Pipeline Company of America (NGP) owned the pipeline. The ruptured pipeline exploded, engulfing the vessel in flames. The vessel sank, and eleven of the fourteen crew members aboard the vessel died. On October 10, 1989, Zapata Haynie filed a complaint in the United States District Court, seeking exoneration from and/or limitation of liability under the Federal Limitation of Vessel Owner's Liability Act, 46 U.S.C. §§ 181-195. In accordance with the Federal Rules of Civil Procedure Supplemental Rules for Certain Admiralty and Maritime Claims, Rule F, the federal district court stayed all other court proceedings and ordered all persons asserting a claim in connection with the October 3, 1989 accident to file their claims in the federal proceedings. The plaintiffs were among those persons ordered to assert their claims.

The plaintiffs answered the limitation proceedings, asserting claims against Zapata Haynie's right to exoneration from and/or limitation of liability. They asserted that Zapata Haynie was negligent and at fault in causing the accident and resulting deaths. On June 26, 1990, the plaintiffs also filed suit in state court against Zapata Haynie and Darreyl Gough, master of the vessel, asserting damages under the Jones Act, 46 U.S.C. § 688 and requesting jury trials. The plaintiffs subsequently amended their petitions in the state court action to effect a direct action against the insurers of the vessel, Abu Dhabi National Insurance Company and Underwriters at

Lloyd's, and certain insurance companies through Atlantic Insurance International, Inc. The state proceedings were stayed, pursuant to the earlier federal district court order, pending a decision on the limitation of liability action.

After a three-week trial of the limitation action, the federal district court determined that NGP was 100% at fault in causing the accident by failing to maintain the pipeline at least three feet below the seabed as required by the Corps of Engineers permit. It found that the vessel was not touching the seabed when the accident occurred and that Zapata Haynie did not have a duty to foresee the possibility of its vessel striking a pipeline that should have been buried deeply enough to pose no hazard to navigation. Moreover, the federal court found that Zapata Haynie did not violate any other duty it may have owed to the crew members of the vessel. This decision, exonerating Zapata Haynie from all liability under the Jones Act and general maritime law, was affirmed on appeal by the U.S. Fifth Circuit Court of Appeals in *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2999 (1993).

After Zapata Haynie was found to be without fault in causing the accident, its insurers filed an exception of res judicata in the state court action, contending, among other things, that the plaintiffs' claims against them under the Louisiana Direct Action Statute, La.R.S. 22:655, were barred by res judicata because the federal court had exonerated their insured, Zapata Haynie, from liability. The trial court agreed that the claims were barred by res judicata and granted the insurers' exception.

OPINION

The plaintiffs first argue that the federal court's exoneration of Zapata Haynie does not preclude their claim under La.R.S. 22:655, the Louisiana Direct Action Statute, because a shipowner's right to limit its liability under the Limitation of Vessel Owner's Liability Act is personal to the shipowner. In support of their position, the plaintiffs cite *Danzy v. U. S. Fidelity & Guaranty Co.*, 380 So.2d 1356, 1359 n.5 (La.1980) [quoting *Gustafson v. Peck*, 216 F.Supp. 370, 372-73 (N.D. Iowa 1963)], wherein the Louisiana Supreme Court stated:

> This court has long held that where an immunity from suit is merely personal, an insurer is not entitled to plead such immunity as a defense to a suit brought under the Direct Action Statute. Edwards v. Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935); Comment, the Louisiana Direct Action Statute, 22 La.L.Rev. 243 (1961). In Edwards the court made the following observation concerning the intent of the legislature in providing for a direct action against the insurer:
>
> "It is, therefore, our opinion that the Legislature intended to give the insurer the right to plead defenses which it could urge against the insured, but not defenses which are purely personal between the insured and claimant, and in no way growing out of, or connected with, the accident or policy." 182 La. at 181, 161 So. at 195.
>
> The statutory basis for this doctrine is found in C.C. 2098, which concerns suit against a codebtor in solido, the status occupied by an insurer vis-a-vis its insured, and which provides that the codebtor "can not plead such exceptions as

> are merely personal to some of the other codebtors."
>
> The following forms of immunity from suit have been found to be merely personal to an insured and therefore unavailable to the insurer: interspousal immunity, Edwards v. Royal Indemnity Co., supra, LeBlanc v. New Amsterdam Cas. Co., 202 La. 857, 13 So.2d 245 (1943); father-son immunity, Deshotel v. Travelers Indemnity Co., 257 La. 567, 243 So.2d 259 (1971); governmental immunity, Snell v. Stein, 261 La. 358, 259 So.2d 876 (1972); charitable immunity, Lusk v. U. S. Fidelity & Guaranty Co., 199 So. 666 (La.App.Orl.1941); an insane person's incapacity to be liable for his torts, von Dameck v. St. Paul Fire & Marine Ins. Co., 361 So.2d 283 (La.App.1978) [*writs denied*, 362 So.2d 794, 802 (La.1978)]. In a case similar to the one before us, to the extent that it necessitated reconciling the immunity granted to shipowners by the Federal Limitation of Liability Act, 46 U.S.C. § 183(a) with the Louisiana Direct Action Statute, the United States Fifth Circuit Court of Appeals found that because the statutory right to limit liability is personal to the shipowner, it does not preclude a direct action against its insurer. Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), cert. den. 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970).

However, in each of the situations recognized by the supreme court, the immunities merely erected a *procedural bar* to asserting the cause of action but did not *eliminate* the underlying cause of action. The case before this court is distinguishable from those procedural immunity situations in that the federal court judgment has

eliminated the underlying cause of action against Zapata Haynie. Therefore, we find that Zapata Haynie's insurers are not precluded from asserting their claim to res judicata.

The doctrine of res judicata is intended to "increase judicial efficiency and to protect parties against unnecessary burdens of litigation arising from repeated lawsuits." *Mavromatis v. Lou-Mar, Inc.*, 93-0379, p. 5 (La.App. 4 Cir. 2/11/94); 632 So.2d 828, 832. "A final judgment in the federal system *can* form the basis of a res judicata plea in state court. *Jones v. Jefferson Parish Sch. Bd.*, 447 So.2d 1205, 1207 (La.App. 5 Cir.), *writ denied*, 450 So.2d 953 (La.1984). The essential elements of res judicata under Louisiana law are enumerated in La.R.S. 13:4231. Effective January 1, 1991, La.R.S. 13:4231 was amended to broaden its scope, but the amendments do not apply to an action filed before that date. Prior to January 1, 1991, La.R.S. 13:4231 provided:

> The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality.

Also, prior to the January 1, 1991 amendments, the concept of res judicata in Louisiana was considered to be more narrow in scope than its common law counterparts. *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154 (La.1978).

However, it is the broader res judicata definition of the federal courts that is applicable to this matter.

> When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied.

Tye v. Co-Mar Offshore Operators, Inc., 95-0094 p. 3 (La.App. 1 Cir. 10/6/95); 669 So.2d 438, 439, *writ denied*, 96-1051 (La. 6/7/96); 674 So.2d 975 (citation omitted). For a federal court judgment to bar a subsequent suit under federal res judicata principals, it must meet four tests: (1) both cases must involve the same parties; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) the prior judgment must have been a final judgment on the merits; *and* (4) the cause of action at issue must have been the same in both cases. *Terrebonne Fuel & Lube, Inc. v. Placid Ref. Co.*, 95-0654, 95-0671 (La. 1/16/96); 666 So.2d 624.

The plaintiffs acknowledge that the elements of res judicata have been satisfied as to any claims against Zapata Haynie but argue that the elements have not been satisfied as to the insurers because the identity of the parties is not the same. However, for the purpose of res judicata, the Louisiana Supreme Court has determined that "[t]here exists an identity of the parties whenever the same parties, their successors, or others appear so long as they share the same 'quality' as parties." *Welch*, 359 So.2d at 156. This court in *Hannie v. Wall*, 569 So.2d 1044, 1050 (La.App. 3 Cir. 1990), *writ not considered, not timely filed*, 573 So.2d 1116 (La.1991), declared, "the insured and the insurer not only share the same quality as parties, but in essence their identities are virtually merged into one, to the extent of the policy limits." (Citations omitted). Thus,

permitting the plaintiffs to proceed against Zapata Haynie's insurers under the direct action statute would result in relitigating the issue of Zapata Haynie's liability in the accident. This is barred by res judicata. *See also Foster v. Hampton,* 352 So.2d 197 (La.1977); *Cornish v. Freeman,* 451 So.2d 148 (La.App. 1 Cir.), *writ denied,* 458 So.2d 476 (La.1984).

DISPOSITION

Accordingly, the trial court's judgment sustaining the insurers' exception of res judicata is affirmed. Costs are assessed to plaintiffs-appellants.

AFFIRMED.

NUMBER 95-957

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARY KING-HILL, ET AL.

Plaintiff-Appellant

VERSUS

ZAPATA HAYNIE CORPORATION, ET AL.

Defendants-Appellees

On appeal from the Thirty-Eighth Judicial District Court, Parish of Cameron, State of Louisiana, the Honorable H. Ward Fontenot, District Judge, presiding.

Before DOUCET, C.J.; COOKS; WOODARD; DECUIR; and PETERS, Judges.

PETERS, J.

For the reasons stated in the companion case of *Diane Arthur v. Zapata Haynie Corporation, et al.*, 96-956 (La.App. 3 Cir. / /); ___ So.2d ___, in which a separate decision is being rendered by us this day, the judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants.

AFFIRMED.

/s/ Cooks J. dissents.

NUMBER 95-958

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MARGARET HEBERT JACKSON, ET AL.

Plaintiffs-Appellants

VERSUS

ZAPATA HAYNIE CORPORATION, ET AL.

Defendants-Appellees

On appeal from the Thirty-Eighth Judicial District Court, Parish of Cameron, State of Louisiana, the Honorable H. Ward Fontenot, District Judge, presiding.

Before DOUCET, C.J.; COOKS; WOODARD; DECUIR; and PETERS, Judges.

PETERS, J.

For the reasons stated in the companion case of *Diane Arthur v. Zapata Haynie Corporation, et al.*, 96-956 (La.App. 3 Cir. / /); ___ So.2d ___, in which a separate decision is being rendered by us this day, the judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants.

AFFIRMED.

/s/ Cooks J. dissents.

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Barbara B. Cox
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Roberta D. Burnett
Deputy Clerk – Criminal

DIANE ARTHUR ETC.

Versus

No. 95 00956
CONSOLIDATED

ZAPATA HAYNIE CORPORATION, ET AL
BEFORE: NED SRC BCW OAD JCP

ORDER

The Application for Rehearing herein having been duly considered: IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED.

Lake Charles, Louisiana.

APRIL 8, 1997

NED
BCW
OAD
JCP
Judges

Cooks, J., would grant the rehearing.

Kenneth J. deBLANC
Clerk

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MARY KING HILL INDIV. AND AS PERS. REP. ETC.

Versus

No. 95 00957
CONSOLIDATED

ZAPATA HAYNIE CORPORATION, ET AL
BEFORE: NED SRC BCW OAD JCP

ORDER

The Application for Rehearing herein having been duly considered: IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED.

Lake Charles, Louisiana.

APRIL 8, 1997

NED
BCW
OAD
JCP
Judges

Cooks, J., would grant the rehearing.

Kenneth J. deBLANC
Clerk

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MARGARET HEBERT JACKSON ETC.

Versus

No. 95 00958
CONSOLIDATED

ZAPATA HAYNIE CORPORATION, ET AL
BEFORE: NED SRC BCW OAD JCP

ORDER

The Application for Rehearing herein having been duly considered: IT IS ORDERED that a Rehearing be, and the same is hereby, DENIED.

Lake Charles, Louisiana.

APRIL 8, 1997

NED
BCW
OAD
JCP
Judges

Cooks, J., would grant the rehearing.

Kenneth J. deBLANC
Clerk

The Supreme Court of the State of Louisiana

MARGARET HEBERT JACKSON, ET AL

VS. NO. 97-C - 1061

ZAPATA HAYNIE CORPORATION, ET AL

IN RE: Jackson, Margaret Hebert; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Cameron 38th Judicial District Court Number 10-12277; to the Court of Appeal, Third Circuit, Number CA95-0958

May 30, 1997

Denied.

HTL
WFM
CDK
BJJ
JPV
CDT
JTK

CALOGERO, C.J. not on panel.

Supreme Court of Louisiana
May 30, 1997

/s/ John Carlton Olivier
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

MARY KING-HILL, ET AL

VS. NO. 97-C – 1018

ZAPATA HAYNIE CORPORATION,
ET AL
AND OTHER CONSOLIDATED CASES

IN RE: Hill, Mary King; – Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Cameron 38th Judicial District Court Number 10-12275, 10-12276, 10-12277, 10-12001; to the Court of Appeal, Third Circuit, Number CA95-0957, CA95-0956

May 30, 1997

Denied.

HTL
WFM
CDK
BJJ
JPV
CDT
JTK

CALOGERO, C.J. not on panel.

Supreme Court of Louisiana
May 30, 1997

/s/ John Carlton Olivier
Clerk of Court
For the Court

The Supreme Court of the State of Louisiana

DIANE ARTHUR

VERSUS

ZAPATA HAYNIE CORPORATION, ET AL
CONSOLIDATED WITH

BARBARA ARTHUR, ET AL

VS. NO. 97-C - 1031

ZAPATA HAYNIE CORPORATION,
ET AL
AND OTHER CONSOLIDATED CASES

IN RE: Arthur, Diane; Arthur, Barbara; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Cameron 38th Judicial District Court Number 10-12275, 10-12276, 10-12277, 10-12001; to the Court of Appeal, Third Circuit, Number CA95-0957, CA95-0956

May 30, 1997

Denied.

HTL
WFM
CDK
BJJ
JPV
CDT
JTK

CALOGERO, C.J. not on panel.

Supreme Court of Louisiana
May 30, 1997

/s/ John Carlton Olivier
Clerk of Court
For the Court

S/HIS, Inc. Page 251, Policy No. CN89-2429

SECTION P

MARITIME EMPLOYERS' LIABILITY

1. NAMED INSURED:

Zapata Corporation, its affiliated, subsidiary and interrelated companies, and/or co-venturers and/or operators and/or owners as may now or hereafter exist, as agreed by the company and having an interest hereunder at the time of happening of any loss, as their respective rights and interests do appear.

2. COVERAGE:

This Section, subject to the terms, conditions and limitations hereinafter mentioned, is to pay on behalf of or to indemnify the Insured (hereinafter called "the Employer") for claims for bodily injury of employees arising out of the Employer's maritime operations.

3. LIMIT OF LIABILITY/DEDUCTIBLE:

Liability shall attach to the Underwriter only after the Insured's deductible has been paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

$ 20,000 ultimate net loss in respect of each person and subject to that same limit each person,

$ 20,000 ultimate net loss in respect of each accident, (all hereinafter referred to as "the Deductible or Amount")

and the Underwriter shall then be liable to pay only such additional amount or amounts as will provide the Employer with a total coverage under this Section combined of:

$1,000,000 ultimate net loss in respect of each person and subject to that same limit each person,

$1,000,000 ultimate net loss in respect of each accident and in the aggregate as respects occupational disease.

4. EXCLUSIONS:

Unless specially agreed by endorsement hereon the liability granted under this Policy shall not apply:

(A) to any obligation for which the Employer or any carrier as his insurer may be held liable under any workmen's compensation law or any unemployment compensation or disablement benefits law:

(B) to any obligation for which the Employer or any carrier as his insurer may be held liable under the United States Federal Longshoremen's and Harbor Workers' Compensation Act and all amendments thereto.

5. DEFINITIONS:

(A) The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.

(B) The words "ultimate net loss" shall be understood to mean the amount payable in settlement of the liability of the Employer after making deductions for all recoveries and for other valid and collectible insurances and shall exclude all

expenses and "Costs". "Costs" shall be apportioned as provided for and subject to the limitations and exceptions of Paragraph 6 hereof.

(C) The word "Costs" shall be understood to mean "pre" and/or "post" judgment interest, investigation, adjustment and legal expenses (excluding, however, all office expenses of the Employer, all expenses for salaried employees of the Employer and general retainer fees normally paid by the Employer).

6. COSTS CLAUSE:

In the event of claim or claims arising which appear likely to exceed the deductible, no costs shall be incurred by the Employer without the consent of the Underwriter.

Costs incurred by or on behalf of the Employer with the consent of the Underwriter, and for which the Employer is liable, shall be apportioned as follows:

(A) Should any claim or claims become adjustable prior to the commencement of trial for not more than the deductible or Limits, then no Costs shall be payable by the Underwriter.

(B) Should, however, the amount for which the said claim or claims may be so adjustable exceed the deductible, then the Underwriter, if they consent to the proceedings continuing, shall contribute to the Costs incurred by or on behalf of the Employer in the ration that their proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.

(C) In the event that the Employer elects not to appeal a judgment in excess of the deductible,

the Underwriter may elect to conduct such appeal at their own costs and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of the Underwriter exceed their limits of liability as provided for herein, plus the expenses of such appeal.

7. RECOVERIES:

All recoveries or payments recovered or received subsequent to a loss settlement under this Section shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Employer and the Underwriter, provided always that nothing in this Section shall be construed to mean that losses under this Section are not payable until the Employer's ultimate net loss has been finally ascertained.

8. COMMENCEMENT OF LIABILITY:

Liability to pay under this Section shall not attach unless and until the Employer shall have admitted liability for the deductible or unless and until the Employer has by final judgment been adjudged to pay an amount which exceeds such deductible and then only after the Employer has paid or has been held liable to pay the full amount of the Deductible Amount.

SECTION N
COMPREHENSIVE GENERAL LIABILITY
DECLARATIONS

1. ASSURED:

   Zapata Corporation, Zapata Gulf Marine Corporation, their affiliated, subsidiary and interrelated companies, and/or co-venturers and/or operators and/or owners as may now or hereafter exist, as agreed by the company and having an interest hereunder at the time of happening of any loss, as their respective rights and interests do appear.

2. INTEREST:

   $500,000 any one accident or occurrence, inclusive of cost of defense of suit of litigation.

   Regardless of the number of (1) assureds under this Policy, (2) persons or organizations who sustain bodily injury or property damage, or (3) claims made or suits brought on account of bodily injury or property damage, the limit of liability above is the total limit of the Company's liability for all damages including damages for care and loss of services because of bodily injury or property damage sustained by one or more persons or organizations as a result of any one occurrence.

   For the purpose of determining the limit of the Company's liability, all bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general condition shall be considered as arising out of one occurrence.

The Policy is not subject to an annual aggregate limit of liability.

3. DEDUCTIBLE:

A deductible of $100,000 applies to all damages insured under this Policy sustained as a result of any one occurrence.

The Company shall be liable only for the difference between the deductible amount and the limits of liability stated in the Policy and any payment made which includes such deductible amounts shall not increase the Company's liability with respect to each occurrence.

The terms of this Policy, including those with respect to the Company's rights and duties to defend suits or the insureds duties in the event of an occurrence apply irrespective of the application of the deductible amount.

The Company may pay any part or all of the deductible amount, and upon notification of the action taken, the Named Insured shall promptly reimburse the Company for such part of the deductible amount as has been paid by the Company.

SECTION N

COMPREHENSIVE GENERAL LIABILITY INSURING AGREEMENTS

The Company hereby agrees, subject to the limitations, terms conditions, and exclusions hereinafter mentioned, to indemnify or pay on behalf of the Assured for all sums for which the Assured shall be obligated to pay by reason of:

1. Liability imposed upon the Assured by law, or

2. Liability assumed under contract or agreement by the Named Assured and/or any officer, director, stockholder, partner or employee of the Named Assured which acting in his capacity as such, for damages on account of:

(A) personal injuries;

(B) property damage;

(C) marine liability;

(D) advertising liability; and

(E) products/completed operations liability.

Further, it is agreed that if a claim is made or a suit is brought the company shall have the right but not the duty to investigate and settle such claims and to defend such suits. In any case in which the Company elects not to investigate, settle or defend, the insured, under the supervision of the Company, shall make or cause to be made such investigation and defense as are reasonably necessary, and subject to prior authorization of the Company within the limits of liability of the Policy will effect to the extent possible such settlement or settlements as the Company shall deem prudent. It is further agreed that the cost of investigating, handling and defending claims and suits are included in the limits of liability of the Policy.

SECTION N

COMPREHENSIVE GENERAL LIABILITY DEFINITIONS

1. ASSURED:

The word ASSURED wherever used in this Policy includes:

A. The Named Assured, and if the Named Assured is designated as a partnership or joint venture, the partnership or joint venture so designated and any partner or member thereof, but only with respect to his liability as such;

B. Any officer, director or stockholder, partner or employee of the named Assured while acting in his capacity as such, in any organization or proprietor with respect to real estate management for the Named Assured;

Notwithstanding the foregoing, the inclusion as an Assured or a partner or employee shall be at the sole option of the Named Assured.

C. Any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this Policy, but only to the extent of such obligation and in respect of operations by or on behalf of the Named Assured. However, such a person, organization, trustee or estate shall under no circumstances have broader a coverage than which is available to the Named Assured under this Policy.

2. PERSONAL INJURIES:

The term PERSONAL INJURIES whenever used herein means bodily injury (including death at any time resulting therefrom), mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, libel, slander or defamation of character or invasion of rights of privacy, except that which arises out of any advertising activities. It shall also include injury as a result of malpractice, error or mistake, sustained by any person, committed during the Policy Period, in rendering or failing to render medical, surgical, dental, nursing or first aid treatment or service or in furnishing or dispensing drugs or medical, surgical or dental supplies by any employee of the Named Assured rendering first aid or medical treatment while in the course and scope of their employment with the Named Assured.

3. MARINE LIABILITY:

The term MARINE LIABILITY whenever used herein shall mean all Protection and Indemnity risks of whatsoever nature including, but not limited to;

A. Those covered by the underlying Protection and indemnity Insurances;

B. Those which are absolutely or conditionally undertaken by The United Kingdom Mutual Steamship Assurance Association Limited;

C. General Average, Collision Liabilities, Salvage, Salvage Charges and Sue and Labor arising from any cause whatsoever; and

D. All other sums which the Assured shall become legally liable to pay or by contract or agreement become liable to pay in respect of claims made

against the Assured for damages of whatsoever nature.

4. PROPERTY DAMAGE:

The term PROPERTY DAMAGE wherever used herein shall mean:

A. Physical injury to or destruction of tangible property, including the loss of use thereof at any time resulting therefrom, or;

B. Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the Policy Period.

C. All costs and/or expenses of, or incidental to, the actual or attempted raising; removal and/or destruction of wreckage and/or debris of property of the Named Assured or of other, including the provision and/or maintenance of lights, markings, audible warnings, etc. for such wreckage and/or debris, caused by an occurrence during the term of this Policy; when:

(1) The incurring of such cost and/or expense by the Named Assured is compulsory by any law, ordinance or regulation, or;

(2) The Named Assured is liable for such costs and/or expenses under contract or otherwise, or;

(3) Such wreckage and/or debris interferes with the normal operations of other parties, or;

(4) Such wreckage and/or debris constitutes a hazard to navigation or to other traffic, provided however, that from any such claim for cost and/or expenses shall be deducted the value of any property salvaged or recovered

but only to the extent that such value inures finally and irrevocably to the benefit of the Named Assured.

5. OCCURRENCE:

The term OCCURRENCE wherever used herein, shall mean an accident or a happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally results in personal injury, and/or property damages during the Policy Period. All such exposure to substantially the same conditions existing at or emanating from one premises location shall be deemed one occurrence.

6. DAMAGES:

The term DAMAGES includes damages for death and for care and loss of services resulting from personal injury and damages for loss of use of property resulting from property damage. It is further agreed that damages are defined to mean compensatory damages but include punitive damages unless it is against public policy for an insurer to indemnify an insured for punitive damages in the jurisdiction involved.

7. PRODUCTS/COMPLETED OPERATIONS LIABILITY:

A. The term PRODUCTS LIABILITY shall mean liability arising out of foods or products manufactured, sold, handled or distributed by the Assured or by others trading under his name (hereinafter called the Assured's Products) if the occurrence occurs after possession of such goods or products has been relinquished to others by the Assured or by others trading under his name, and if such occurrence occurs away from premises owned, rented or controlled by the Assured except dining facilities located in or on property

owned by the Assured; provided such goods or products shall be deemed to include any container thereof, other than a vehicle, but shall not include any vending machine or other property other than such container, rented to or located for use of others but not sold;

B. The term COMPLETED OPERATIONS LIABILITY shall mean liability arising out of operations, if the occurrence occurs after such operations have been completed or abandoned and occurs away from premises owned, rented or controlled by the Assured; provided operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to an agreement; provided further, the following shall not be deemed to be operations within the meaning of this paragraph;

(1) Pick-up or delivery, except from or onto railroad car;
(2) The maintenance of vehicles owned or used by or on behalf of the Assured;
(3) The existence of tools, uninstalled equipment and abandoned or unused material.

8. ADVERTISING LIABILITY:

The term "Advertising Liability" wherever used herein shall mean:

A. libel, slander or defamation;

B. any infringement of copyright or of title or of slogan;

C. piracy or unfair competition or idea misappropriation under an implied contract;

D. any invasion of right of privacy;

committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Named Assured's advertising activities.

SECTION N

COMPREHENSIVE GENERAL LIABILITY EXCLUSIONS

This Section shall not apply:

1. to any obligation for which the Assured and any Company as its Insurer may be held liable under any Worker's Compensation, Unemployment Compensation or Disability Law provided, however, that this exclusion does not apply to liability of another assumed by the Named Assured under contract or agreement;

2. to claims made against the Assured;

   A. for repairing or replacing any defective part or parts of a product or products manufactured, sold or supplied by the Assured or any defective part or parts thereof nor for the cost of such repair or replacement;

   B. for improper or inadequate performance, design or specification; but nothing herein contained shall be construed to exclude claims made against the Assured for personal injuries or property damage (other than damage to the defective part of the product of the assured) resulting from improper or inadequate performance, design or specification;

   C. for the withdrawal, inspection, repair, replacement, or loss of use of the Assured's products or

work completed by or for the Assured or of any property of which such products or work form a part, if such products, work or property are withdrawn from the market or from use because of any known or suspected defect or deficiency therein.

3. to any liability arising out of the violation of any statute, law, ordinance or regulation prohibiting discrimination or humiliation because of race, creed, color or national origin;

4. A. Except in respect of occurrences taking place in the United States of America, its territories or possessions or Canada to loss, damage or liability directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war is declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or nationalization or requisition or destruction of or damage to property by or under the order of any government of public or local authority;

   B. Nevertheless, this exclusion shall not apply except as provided in (C) below, to liabilities:

      (1) arising in connection with vessels owned, chartered, hired or otherwise used by the Assured;

      (2) arising out of property of any kind in transit by land, water or air during such periods as would be covered for full War Risks under an insurance covering physical loss of or damage to cargo subject to the Institute War Clauses relevant to the particular form of transit;

      (3) arising out of any waterborne operations;

(4) to seamen or under Worker's Compensation Statutes;

(5) for death or bodily injury to persons of any kind;

C. Notwithstanding the provisions of (2) above, the clause set out in (A) above shall not apply to the liability set out in (b) above:

(1) unless sooner applied under the provisions of (2) and (3) automatically upon and simultaneously with the outbreak of war (whether there be a declaration of war or not) between any of the following countries: United States of America, United Kingdom, France, The Union of the Soviet Socialist Republics, The People's Republic of China;

(2) at any time of the Assured's request, or by Underwriters giving fourteen (14) days written notice to the Assured, but in no event shall such notice affect or postpone the operation of the provisions of (1) or (3). Written or telegraphic notice sent to the Assured at his (its) last known address shall constitute a complete notice. The mailing of notice, as aforesaid, shall be sufficient proof of notice and the effective date and hour of the operation of the clause set out in (a) above shall be fourteen (14) days from Midnight of the day on which such notice was mailed or telegraphed as aforesaid. Underwriters agree, however, that the clause set out in (a) above shall not apply subject to the aforesaid effective date and hour as to an additional premium and/or new conditions and/or warranties.

(3) unless sooner terminated under the provision of (1) or (2), this insurance is automatically terminated in respect of an insured vessel which is requisitioned, either for title or use, by the Government of the United States or of the country in which any such right of requisition is vested;

If, subsequent to the agreement of an additional premium, as provided by paragraph (2) above, either the Assured or Underwriters again elect to exercise the option provided therein or paragraphs (1) and (3) become operative, pro rata net return of the additional premium paid shall be refunded to the Assured. Such return premium will be paid on demand or as soon thereafter as practicable to do so.

5. Notwithstanding anything otherwise contained herein to the contrary, it is specifically understood and agreed this insurance does not insure any liability, whether direct or indirect, which may inure to the Assured by virtue of any provision of the Employees Retirement Income Security Act of 1974.

6. This Policy does not apply to bodily injury or property damage;

A. with respect to which an Insured under this policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or

B. resulting from the hazardous properties of nuclear material and with respect to which (a)

any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the insured is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agent thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

7. This Policy does not apply to bodily injury or property damage resulting from the hazardous properties of nuclear material, if

   A. the nuclear material (a) is at any nuclear facility owned by, or operated by or on behalf of, an insured or (b) has been discharged or dispersed therefrom;

   B. the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an insured; or

   C. the bodily injury or property damage arises out of the furnishing by an insured of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any nuclear facility, but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (C) applies only to property damage to such nuclear facility and any property thereat.

SECTION N

COMPREHENSIVE GENERAL LIABILITY CONDITIONS

1. PREMIUM:

Unless otherwise provided for, the premium for this Section is a flat premium and is not subject to adjustment or return.

2. INSPECTION AND AUDIT:

The Company shall be permitted, but not obligated, to inspect the Assured's property and operations at any time. Neither the Company's right to make inspections, nor the making thereof, nor any report thereon, shall constitute an undertaking on behalf of or for the benefit of the Assured or others, to determine or warrant that such property or operations are safe. The Company may examine and audit the Assured's books and records at any time during the policy Period, and extensions thereof, within three years after the final termination of the Policy, as far as they relate to the subject matter of this insurance.

3. CROSS LIABILITIES:

In the event of claims being made by reason of personal injury suffered by an employee of one Assured hereunder for which another Assured is or may be liable, then this Section shall cover such Assured against whom a claim is made or may be made in the same manner as if separate Policies had been issued to each Assured hereunder.

In the event of claims being made by reason of damage to property belonging to any Assured hereunder for which such Assured is, or may be liable, then this Section shall cover such Assured against whom a

claim is made or may be made in the same manner as if separate Policies had been issued to each Assured hereunder.

Nothing herein shall operate to increase Underwriter's limit of liability as set forth in the Declarations.

4. NOTICE OF OCCURRENCE:

Whenever the Assured has information from which the Assured may reasonably conclude that an occurrence covered hereunder involves injuries or damages which, in the event the Assured should be held liable, is likely to involve this Policy, Notice shall be sent to the Company in writing as soon as practicable; provided, however, that failure to give Notice of any occurrence which at the time of its happening did not appear to involve this Policy but which, at a later date, would appear to give rise to claims hereunder, shall not be prejudice such claims.

5. ASSISTANCE AND COOPERATION:

the Company shall not be called upon to assume charge of the settlement of defense of any claim made or suit brought or proceeding instituted against the Assured, but the Company shall have the right and shall be given the opportunity to associate with the Assured in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve, the Company, in which event the Assured and the Company shall cooperated in all things in the defense of such claim, suit or proceeding.

6. OTHER INSURANCE:

If other valid and collectible insurance with any other insurer if available to the Assured covering a loss also covered by this Policy, the insurance afforded by this Policy is primary insurance, except when stated to

apply in excess of or contingent upon the absence of other insurance.

7. SUBROGATION:

In the event of any payment under this Policy, the Company shall be subrogated to all the Assured's right of recovery therefrom against any person or organization and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after a loss to prejudice the rights of the Company in this regard.

Notwithstanding the provisions of this condition, it is hereby understood and agreed that the Company agrees to waive rights of subrogation when it is required under contract.

8. CHANGES:

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this Policy or estop the Company from asserting any right under the terms under this Policy, nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy.

9. ASSIGNMENT:

assignment of interest under this Policy shall not bind the Company unless and until their consent is endorsed hereon.

10. CURRENCY:

The premiums and losses in this Policy are payable in United States Dollars.

11. ACTION AGAINST COMPANY:

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy. Further, no action shall lie against the Company until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the Claimant and the company. It is agreed that in the event of the failure of the Company hereon to pay on the amount of claim to be due hereunder, the Company hereon to pay on the amount of claim to be due hereunder, the Company at the request of the Assured will submit to the jurisdiction of any court of competent jurisdiction within the United States and will comply with all requirements necessary to give such court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such court.

It is further agreed that service of process in any suit may be made on Messrs. Mendes and Mount and that in any suit institute against it, the Company will abide by the final decision of such court or of any appellate court in the event of an appeal. Messrs. Mendes and Mount are authorized and directed to accept service on behalf of the Company in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon the Company's behalf in the event such suit shall be instituted.

12. ADDITIONAL ASSUREDS:

Any person, firm or corporation who possesses a Certificate of Insurance with regard to this Policy, duly executed by Soriero/Hatzel Insurance Services, Inc., shall be deemed to be an Additional Assured and to be exempt from subrogation by Underwriters,

if the certificate so states these provisions, but only in respect to the actual units, or vessels performing work for that entity at the time of loss, if any.

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SECTION B

UNIT I
PART B
PROTECTION AND INDEMNITY/MARINE LIABILITY
SP-23 (Revised 1/56) and Amendments

Amount Insured $500,000
Premium $ Per Schedule
Rate N/A

As Per Special Conditions hereinafter called the Assured; Loss, if any, payable to As Per Special Conditions or order in the sum of Five Hundred thousand and No/100 Dollars at and from the 1st day of April 1989, at 12:01 A.M. Central time until the 1st day of April 1990, at 12:01 A.M. Central time against the liabilities of the Assured as hereinafter described, and subject to the terms and conditions hereinafter set forth, in respect of the vessel called the As Per Section A, Parts I and II (Tonnage ___) or by whatsoever other names the said vessel is or shall be named or called.

In consideration of the Stipulations Herein Named and of Per Schedule Dollars, being Premium at the rate of N/A.

The Assurer hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expense as the Assured shall have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth:

Loss of Life, Injury and Illness

Liability for loss of life of, or personal injury to, or illness of, or to save and recover lives of, any person, excluding, however, unless otherwise agreed by endorsement hereon, liability under any Compensation Act to any employee of the Assured, (other than a seaman) or in case of death to his beneficiaries or others.

Protection hereunder for loss of life or personal injury arising in connection with the handling of cargo of the vessel named herein shall commence from the time of receipt by the Assured of the cargo on dock or wharf or on craft alongside the said vessel for loading thereon and shall continue until delivery thereof from dock or wharf of discharge or until discharge from the said vessel on to another vessel or craft.

Hospital, Medical, or Other Expenses

Liability for hospital, medical, or other expenses necessary and reasonably incurred in respect of loss of life of, personal injury to, or illness of, or to save and recover lives of any member of the crew of the vessel named herein or any other person.

Liability hereunder shall also include burial expenses not exceeding Two Hundred ($200) Dollars, when necessarily and reasonably incurred by the Assured for the burial of any seaman of said vessel.

Repatriation Expenses

Liability for repatriation expenses of any member of the crew of the vessel named herein, necessarily and reasonably incurred, under statutory obligation, excepting such expenses as arise out of or ensue from the termination of

any agreement in accordance with the terms thereof, or by mutual consent, or by sale of the said vessel, or by other act of the Assured. Wages shall be included in such expenses when payable under statutory obligation, during unemployment due to the wreck or loss of the said vessel.

Damage to Other Vessel or Property on Board Caused by Collision Principle of Cross-Liabilities to Prevail

Liability for loss of, or damage to, any other vessel or craft, or to the freight thereof, or property on such other vessel or craft, caused by collision with the vessel named herein, insofar as such liability would not be covered by full insurance under the Part A, Hull & Machinery Policy (including the four-fourths running-down clause).

1. Claims under this clause shall be settled on the principle of cross-liabilities to the same extent only as provided in the running-down clause above mentioned.

2. Claims under this clause shall be divided among the several classes of claims enumerated in this policy and each class shall be subject to the deduction and special conditions applicable in respect of such class.

3. Notwithstanding the foregoing, if any one or more of the various liabilities arising from such collision has been compromised, settled or adjusted without the written consent of the Assurer, the Assurer shall be relieved of liability for any and all claims under this clause.

Damage to Other Vessel or Property Onboard not Caused by Collision

Liability for loss of or damage to any other vessel or craft, or to property on such other vessel or craft, not caused by collision, provided such liability does not arise by reason of a contract made by the Assured.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Damage to Docks, Piers, etc.

Liability for damage to any dock, pier, harbor, bridge, jetty, buoy, lighthouse, breakwater, structure, beacon, cable, or to any fixed or movable object or property whatsoever, except another vessel or craft, or property on another vessel or craft.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Personal Effects of Crew

It is agreed that this Policy shall cover the Named Assured's liability for loss of personal effects of crew-members of vessels insured hereunder as a result of loss from the perils named herein. However, the Assured's limit of liability with respect to this coverage shall not

exceed $500.00 per crewmember per occurrence subject to no deductible.

Customs, Immigration or Other Fines or Penalties

Liability for fines and penalties, including expenses necessarily and reasonable incurred in avoiding or mitigating same, for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Assurer shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of any such laws.

Mutiny or Other Misconduct

Expenses incurred in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

Extra Ordinary Expenses in Case of Quarantine, etc.

Liability for extraordinary expenses resulting from outbreak of plague or other contagious disease, including such expenses incurred for disinfection of the vessel named herein or persons on board, or for quarantine, but excluding the ordinary expenses of loading and/or discharging, and the wages and provisions of crew and passengers; each claim under this provision is subject to a deduction of Two Hundred ($200) Dollars. It is provided further, however, that if the vessel named herein be ordered to proceed to a port when it is or should be known that calling there will subject the vessel to the

extraordinary expenses above mentioned, or to quarantine or disinfection there or elsewhere, the Assurer shall be under no obligation to indemnify the Assured for any such expenses.

Deviation for Purpose of Landing Injured or Ill

Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect of port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation.

Full Cargo Legal Liability

It is understood and agreed that this insurance shall cover, subject to its terms and conditions, legal liability for loss of or damage to cargo, including but not limited to loss due to loading, unloading and contamination thereof.

Cargo's Proportion of General Average

Liability for, or loss of, cargo's proportion of General Average, including special charges, insofar as the Assured cannot recover same from any other source; provided, that if the Charter Party, Bill of Lading, or Contract of Affreightment does not contain the quoted clause under Section 8(bb), of form SP-23, the Assurer's liability hereunder shall be limited to such as would exist if such clause were contained therein.

Costs and Charges

Costs, charges, and expenses, reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and

subject further to the conditions and limitations hereinafter provided.

Marine Operator's/Charterer's Liability

1. To cover the Named Assured's liability for:

   A. Physical loss and/or damage to the vessel or watercraft chartered to or used by the Assured, and

   B. Loss of life and/or personal injury and/or illness and/or property damage (including damage to vessels other than those referred to in 1.A. above), and

   C. Removal of wreck and/or debris, and

   D. Demurrage to any vessel or watercraft chartered to or used by the Assured and to any other vessel or property (other than vessel or property owned by the Named Assured).

   Following an accident for which the Assured is legally liable and occurring during the period of this insurance, arising out of, or having a relation to the Assured's chartering, brokering, towing, berthing, servicing, operating, maintenance and/or use of vessels (including loading and/or unloading).

2. It is hereby understood and agreed that this Clause does not cover nor shall any liability attach hereunder:

   A. For liability of the Assured for loss of life or personal injury or illness to their own employees under the United States Longshoremen's & Harbor Worker's Compensation Act (including the Outer Continental Shelf Operations Extension) or any Worker's Compensation Act.

   B. For liability of vessels owned by the Assured.

C. For liability of the Assured for loss or damage to property (other than vessels) owned, occupied or used by or rented to the Assured.

D. For loss of or damage to vessels owned by the Assured.

E. For fees, charges or similar expenses assumed by the Assured under the terms of the charter party.

F. For loss, damage and/or expenses which may be recoverable under any other insurance, carried by or for the account of the Assured.

G. F.C.&S. CLAUSE

Notwithstanding anything herein to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and from all loss, damage or expenses caused by any weapon of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter or by any mine or torpedo, also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collission [sic] or contact with aircraft, rockets or similar missiles or with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather, fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel involved herein is performing) by a hostile act by or against a belligerent power; and for the purposes of this warranty "power" includes any

authority maintaining naval, military or air forces in association with power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or piracy.

Contractual Liability Extension

The coverage afforded under this Policy is extended to insure the liability of the Assured arising out of hold harmless and/or indemnity agreements contained in such contracts as have been or may be entered into prior to loss by the Named Assured for the furnishing of vessel services.

Special Condition

Any sum or sums for which the Assured may become legally liable or incur from causes not hereinbefore specified, but are absolutely or conditionally recoverable from or undertaken by the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

GENERAL CONDITIONS AND/OR LIMITATIONS

Deductible Clause

From the amount of any and all claims insured hereunder for loss of life or bodily injury, resulting from one casualty, the sum of $20,000 shall be deducted. From the total amount of any and all other claims insured hereunder, resulting from one casualty, the sum of $20,000 shall be deducted. However, in no event shall the total sum deducted from the total amount of any and all claims arising from any one casualty exceed $20,000.

Settlement of Claims

The Assured shall not make any admission of liability, either before or after any occurrence which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrences for which the Assurer is liable under this policy; provided, however, that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by Assurer, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.

Assured to Assist with Evidence in Defense, etc.

Whenever required by the Assurer the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

Law costs

The Assurer shall not be liable for the costs or expense of prosecuting or defending any claim or suit unless the same shall have been incurred with the written consent of the Assurer, or the Assurer shall be satisfied that such approval could not have been obtained under the circumstances without unreasonable delay, or that such costs

and charges were reasonably and properly incurred, such cost or expense being subject to the deductible.

The cost and expense of prosecuting any claim in which the Assurer shall have an interest by subrogation or otherwise, shall be divided between the Assured and the Assurer, proportionately to the amounts which they would be entitled to receive respectively, if the suit should be successful.

The Assurer shall be liable for the excess where the amount deductible under this policy is exceeded by (A) the cost of investigating and/or successfully defending any claim or suit against the Assured based on a liability or an alleged liability of the Assured covered by this insurance, or (B) the amount paid by the Assured either under a judgment or an agreed settlement based on the liability covered herein including all costs, expenses of defense and taxable disbursements.

Cover Elsewhere

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

Assignments

No claim or demand against the Assurer under this policy shall be assigned or transferred, and no person, excepting a legally appointed receiver of the property of the Assured, shall acquire any right against the Assurer by virtue of this insurance without the expressed consent of the Assurer.

Actions Against Assurers

No action shall lie against the Assurer for the recovery of any loss sustained by the Assured unless such action is brought against the Assurer within one year after the final judgment or decree is entered in the litigation against the Assured, or in case the claim against the Assurer accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claims.

Time Limitation

The Assurer shall not be liable for any claim not presented to the Assurer with proper proofs of loss within six (6) months after payment thereof by the Assured.

Cross Liabilities Clause

In the event of claims being made by reason of personal injury suffered by an employee of one Assured hereunder for which another Assured is, or may be liable, then this Section shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

In the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is, or may be liable, then this Section shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

Nothing contained herein shall operate to increase the Limit of Liability as set forth herein.

Excess Insurance

Permission is granted for the Assured to have excess insurance over the limits of liability set forth in this Section without prejudice to this Section and the existence of such insurance, if any, shall not reduce any liability under this Section.

In Personam Liability

Privilege is granted for the captain of a pushboat/tug or other qualified pilot, to leave a pushboat/tug and to continue the operation in which a pushboat/tug shall be engaged from other points of vantage while docking or undocking the tow; and this insurance shall extend to and cover the legal liability of either the pushboat or Assured or both, for any act of the pushboat captain while so conducting the operation.

Notwithstanding anything to the contrary contained in this Policy, no liability attaches to the Assurer:

For any loss, damage, or expense which would be payable under the terms of Part A of this Section, hull and machinery, etc., if the vessel were fully covered by such insurance sufficient in amount to pay such loss, damage, or expense.

For any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment, or the consequence thereof or of any attempt thereat; or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin; or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken on the

actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate zone of such engagement; and any such loss, damage and expense shall be excluded from this Policy without regard to whether the Assured's liability therefor is based on negligence or otherwise, and whether before or after a declaration of war.

For any loss, damage, or expense arising from the cancellation or breach of any charter, bad debts, fraud or agents, insolvency, loss of freight hire or demurrage, or as a result of the breach of any undertaking to load any cargo, or in respect of the vessel named herein engaging in any unlawful trade or performing any unlawful act, with the knowledge of the Assured.

It is expressly understood and agreed if and when the Assured under this policy has any interest other than as a shipowner in the vessel or vessels named herein, in no event shall the Assurer be liable hereunder to any greater extent than if such Assured were the owner and were entitled to all the rights of limitation to which a shipowner is entitled.

Limit of Liability

The Company's liability hereunder shall not exceed $500,000 for any and all losses, costs and expenses covered hereunder for each vessel on the Schedule of Vessels, arising out of a single occurrence.

SECTION B

UNIT II
PART B
PROTECTION AND INDEMNITY/MARINE LIABILITY
SP-23 (Revised 1/56) and Amendments

Amount Insured $500,000
Premium $ Per Schedule
Rate N/A

As Per Special Conditions hereinafter called the Assured; Loss, if any, payable to As Per Special Conditions or order in the sum of Five Hundred thousand and No/100 Dollars at and from the 1st day of April 1989, at 12:01 A.M. Central time until the 1st day of April 1990, at 12:01 A.M. Central time against the liabilities of the Assured as hereinafter described, and subject to the terms and conditions hereinafter set forth, in respect of the vessel called the As Per Section A, Parts I and II (Tonnage ___) or by whatsoever other names the said vessel is or shall be named or called.

In consideration of the Stipulations Herein Named and of Per Schedule Dollars, being Premium at the rate of N/A.

The Assurer hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expense as the Assured shall have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth:

Loss of Life, Injury and Illness

Liability for loss of life of, or personal injury to, or illness of, or to save and recover lives of, any person, excluding, however, unless otherwise agreed by endorsement hereon, liability under any Compensation Act to any employee of the Assured, (other than a seaman) or in case of death to his beneficiaries or others.

Protection hereunder for loss of life or personal injury arising in connection with the handling of cargo of the vessel named herein shall commence from the time of receipt by the Assured of the cargo on dock or wharf or on craft alongside the said vessel for loading thereon and shall continue until delivery thereof from dock or wharf of discharge or until discharge from the said vessel on to another vessel or craft.

Hospital, Medical, or Other Expenses

Liability for hospital, medical, or other expenses necessary and reasonably incurred in respect of loss of life of, personal injury to, or illness of, or to save and recover lives of any member of the crew of the vessel named herein or any other person.

Liability hereunder shall also include burial expenses not exceeding Two Hundred ($200) Dollars, when necessarily and reasonably incurred by the Assured for the burial of any seaman of said vessel.

Repatriation Expenses

Liability for repatriation expenses of any member of the crew of the vessel named herein, necessarily and reasonably, incurred, under statutory obligation, excepting such expenses as arise out of or ensue from the termination of

any agreement in accordance with the terms thereof, or by mutual consent, or by sale of the said vessel, or by other act of the Assured. Wages shall be included in such expenses when payable under statutory obligation, during unemployment due to the wreck or loss of the said vessel.

Damage to Other Vessel or Property on Board Caused by Collision Principle of Cross-Liabilities to Prevail

Liability for loss of, or damage to, any other vessel or craft, or to the freight thereof, or property on such other vessel or craft, caused by collision with the vessel named herein, insofar as such liability would not be covered by full insurance under the Part A, Hull & Machinery Policy (including the four-fourths running-down clause).

1. Claims under this clause shall be settled on the principle of cross-liabilities to the same extent only as provided in the running-down clause above mentioned.

2. Claims under this clause shall be divided among the several classes of claims enumerated in this policy and each class shall be subject to the deduction and special conditions applicable in respect of such class.

3. Notwithstanding the foregoing, if any one or more of the various liabilities arising from such collision has been compromised, settled or adjusted without the written consent of the Assurer, the Assurer shall be relieved of liability for any and all claims under this clause.

Damage to Other Vessel or Property Onboard not Caused by Collision

Liability for loss of or damage to any other vessel or craft, or to property on such other vessel or craft, not caused by collision, provided such liability does not arise by reason of a contract made by the Assured.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Damage to Docks, Piers, etc.

Liability for damage to any dock, pier, harbor, bridge, jetty, buoy, lighthouse, breakwater, structure, beacon, cable, or to any fixed or movable object or property whatsoever, except another vessel or craft, or property on another vessel or craft.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Personal Effects of Crew

It is agreed that this Policy shall cover the Named Assured's liability for loss of personal effects of crew-members of vessels insured hereunder as a result of loss from the perils named herein. However, the Assured's limit of liability with respect to this coverage shall not

exceed $500.00 per crewmember per occurrence subject to no deductible.

Customs, Immigration or Other Fines or Penalties

Liability for fines and penalties, including expenses necessarily and reasonably incurred in avoiding or mitigating same, for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Assurer shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of any such laws.

Mutiny or Other Misconduct

Expenses incurred in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or in prosecuting such persons in case of mutiny or other misconduct.

Extra Ordinary Expenses in Case of Quarantine, etc.

Liability for extraordinary expenses resulting from outbreak of plague or other contagious disease, including such expenses incurred for disinfection of the vessel named herein or persons on board, or for quarantine, but excluding the ordinary expenses of loading and/or discharging, and the wages and provisions of crew and passengers; each claim under this provision is subject to a deduction of Two Hundred ($200) Dollars. It is provided further, however, that if the vessel named herein be ordered to proceed to a port when it is or should be known that calling there will subject the vessel to the

extraordinary expenses above mentioned, or to quarantine or disinfection there or elsewhere, the Assurer shall be under no obligation to indemnify the Assured for any such expenses.

Deviation for Purpose of Landing Injured or Ill

Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect of port charges incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation.

Full Cargo Legal Liability

It is understood and agreed that this insurance shall cover, subject to its terms and conditions, legal liability for loss of or damage to cargo, including but not limited to loss due to loading, unloading and contamination thereof.

Cargo's Proportion of General Average

Liability for, or loss of, cargo's proportion of General Average, including special charges, insofar as the Assured cannot recover same from any other source; provided, that if the Charter Party, Bill of Lading, or Contract of Affreightment does not contain the quoted clause under Section 8(bb), of Form SP-23, the Assurer's liability hereunder shall be limited to such as would exist if such clause were contained therein.

Costs and Charges

Costs, charges, and expenses, reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and

subject further to the conditions and limitations hereinafter provided.

Marine Operator's/Charterer's Liability

1. To cover the Named Assured's liability for:

   A. Physical loss and/or damage to the vessel or watercraft chartered to or used by the Assured, and

   B. Loss of life and/or personal injury and/or illness and/or property damage (including damage to vessels other than those referred to in 1.A. above), and

   C. Removal of wreck and/or debris, and

   D. Demurrage to any vessel or watercraft chartered to or used by the Assured and to any other vessel or property (other than vessel or property owned by the Named Assured).

   Following an accident for which the Assured is legally liable and occurring during the period of this insurance, arising out of, or having a relation to the Assured's chartering, brokering, towing, berthing, servicing, operating, maintenance and/or use of vessels (including loading and/or unloading).

2. It is hereby understood and agreed that this Clause does not cover not shall any liability attach hereunder:

   A. For liability of the Assured for loss of life or personal injury or illness to their own employees under the United States Longshoremen's & Harbor Worker's Compensation Act (including the Outer Continental Shelf Operations Extension) or any Worker's Compensation Act.

   B. For liability of vessels owned by the Assured.

C. For liability of the Assured for loss or damage to property (other then vessels) owned, occupied or used by or rented to the Assured.

D. For loss of or damage to vessels owned by the Assured.

E. For fees, charges or similar expenses assumed by the Assured under the terms of the charter party.

F. For loss, damage and/or expenses which may be recoverable under any other insurance, carried by or for the account of the Assured.

G. F.C.&S. CLAUSE

Notwithstanding anything herein to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or any attempt thereat, whether in time of peace or war and whether lawful or otherwise; also warranted free, whether in time of peace of war, from all loss, damage or expense caused by any weapon of war employing atomic or nuclear fission and/or fusion or other reaction or radioactive force or matter or by any mine or torpedo, also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), but this warranty shall not exclude collission [sic] or contact with aircraft, rockets or similar missiles or with any fixed for floating object (other than a mine or torpedo), stranding, heavy weather, fire or explosion unless caused directly (and independently of the nature of the voyage or service which the vessel involved herein is performing) by a hostile act by or against a belligerent power; and for the purposes of this warranty "power" includes any authority

maintaining navel, military or air forces in association with power.

Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or piracy.

Contractual Liability Extension

The coverage afforded under this Policy is extended to insure the liability of the Assured arising out of hold harmless and/or indemnity agreements contained in such contracts as have been or may be entered into prior to loss by the Named Assured for the furnishing of vessel services.

Special Condition

Any sum or sums for which the Assured may become legally liable or incur from causes not hereinbefore specified, but are absolutely or conditionally recoverable from or undertaken by the United Kingdom Mutual Steamship Assurance Association (Bermuda) Limited.

GENERAL CONDITIONS AND/OR LIMITATIONS

Deductible Clause

From the amount of any and all claims insured hereunder for loss of life or bodily injury, resulting from one casualty, the sum of $20,000 shall be deducted. From the total amount of any and all other claims insured hereunder, resulting from one casualty, the sum of $20,000 shall be deducted. However, in no event shall the total sum deducted from the total amount of any and all claims arising from any one casualty exceed $20,000.

Settlement of Claims

The Assured shall not make any admission of liability, either before or after any occurrence which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrences for which the Assurer is liable under this policy; provided, however, that in respect of any occurrence likely to give rise to a claim under this policy, the Assured are obligated to and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by Assurer, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.

Assured to Assist with Evidence in Defense, etc.

Whenever required by the Assurer the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

Law costs

The Assurer shall not be liable for the costs or expense of prosecuting or defending any claim or suit unless the same shall have been incurred with the written consent of the Assurer, or the Assurer shall be satisfied that such approval could not have been obtained under the circumstances without unreasonable delay, or that such costs

and charges were reasonably and properly incurred, such cost or expense being subject to the deductible.

The cost and expense of prosecuting any claim in which the Assurer shall have an interest by subrogation or otherwise, shall be divided between the Assured and the Assurer, proportionately to the amounts which they would be entitled to receive respectively, if the suit should be successful.

The Assurer shall be liable for the excess where the amount deductible under this policy is exceeded by (A) the cost of investigating and/or successfully defending any claim or suit against the Assured based on a liability or an alleged liability of the Assured covered by this insurance, or (B) the amount paid by the Assured either under a judgment or an agreed settlement based on the liability covered herein including all costs, expenses of defense and taxable disbursements.

Cover Elsewhere

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

Assignments

No claim or demand against the Assurer under this policy shall be assigned or transferred, and no person, excepting a legally appointed receiver of the property of the Assured, shall acquire any right against the Assurer by virtue of this insurance without the expressed consent of the Assurer.

Actions Against Assurers

No action shall lie against the Assurer for the recovery of any loss sustained by the Assured unless such action is brought against the Assurer within one year after the final judgment or decree is entered in the litigation against the Assured, or in case the claim against the Assurer accrues without the entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claims.

Time Limitation

The Assurer shall not be liable for any claim not presented to the Assurer with proper proofs of loss within six (6) months after payment thereof by the Assured.

Cross Liabilities Clause

In the event of claims being made by reason of personal injury suffered by an employee of one Assured hereunder for which another Assured is, or may be liable, then this Section shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

In the event of claims being made by reason of damage to property belonging to any Assured hereunder for which another Assured is, or may be liable, then this Section shall cover such Assured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each Assured hereunder.

Nothing contained herein shall operate to increase the Limit of Liability as set forth herein.

Excess Insurance

Permission is granted for the Assured to have excess insurance over the limits of liability set forth in this Section without prejudice to this Section and the existence of such insurance, if any, shall not reduce any liability under this Section.

In Personam Liability

Privilege is granted for the captain of a pushboat/tug or other qualified pilot, to leave a pushboat/tug and to continue the operation in which a pushboat/tug shall be engaged from other points of vantage while docking or undocking the tow; and this insurance shall extend to and cover the legal liability of either the pushboat or Assured or both, for any act of the pushboat captain while so conducting the operation.

Notwithstanding anything to the contrary contained in this Policy, no liability attaches to the Assurer:

For any loss, damage, or expense which would be payable under the terms of Part A of this Section, hull and machinery, etc., if the vessel were fully covered by such insurance sufficient in amount to pay such loss, damage, or expense.

For any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment, or the consequence thereof or of any attempt thereat; or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin; or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken on the

actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate zone of such engagement; and any such loss, damage and expense shall be excluded from this Policy without regard to whether the Assured's liability therefor is based on negligence or otherwise, and whether before or after a declaration of war.

For any loss, damage, or expense arising from the cancellation or breach of any charter, bad debts, fraud or agents, insolvency, loss of freight hire or demurrage, or as a result of the breach of any undertaking to load any cargo, or in respect of the vessel named herein engaging in any unlawful trade or performing any unlawful act, with the knowledge of the Assured.

It is expressly understood and agreed if and when the Assured under this policy has any interest other than as a shipowner in the vessel or vessels named herein, in no event shall the Assurer be liable hereunder to any greater extent than if such Assured were the owner and were entitled to all the rights of limitation to which a shipowner is entitled.

Limit of Liability

The Company's liability hereunder shall not exceed $500,000 for any and all losses, costs and expenses covered hereunder for each vessel on the Schedule of Vessels, arising out of a single occurrence.

THE LAW OF
AMERICAN ADMIRALTY
ITS
JURISDICTION, LAW *and* PRACTICE
WITH
FORMS *and* DIRECTIONS

VOLUME 3

LIMITATION OF LIABILITY

BENEDICT ON ADMIRALTY

Chapter I.

**LIMITATION OF LIABILITY ACT –
TEXT AND BACKGROUND.**

PAGE

SECTION 2. Text of the Limitation of Liability Act, 46 U.S.C. §§ 181-189 (With Historical Notes), and Supplemental Rule F of the Federal Rules of Civil Procedure 1-5

§ 2. Text of the Limitation of Liability Act, 46 U.S.C. §§ 181-189,[1] (With Historical Notes[2]), and Supplemental Rule F of the Federal Rules of Civil Procedure.[3]

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[1] 46 U.S.C. (1926), Chapter 8: 48 U.S. Rev. Stat. (1873), Chapter 6.

[2] The historical footnotes are not part of the text as enacted by Congress. They are largely derived from document no. 196 of the Maritime Law Association of the United States.

[3] Supplemental Rule F, Fed. R. Civ. P., 28 U.S.C.

§ 181[4]

Liability of Masters as Carriers

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefore, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

Historical Note to § 181

This section was originally section 2 of the Act of 1851, and is an expansion of section 3 of the Act of 26

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[4] Originally enacted in 1851 as Section 2; unamended since 1871. R.S. 4281.

George III, Chap. 86, (1786). The original Act of 1851 applied only to "platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones." The words "any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk," were added by the Act of February 28, 1871, Chap. 100, Sec. 69, 16 Stat. 458. The effect of these words was simply to broaden the scope of the exemption regarding precious cargo. The same Act of 1871 added the words "as freight or baggage" after the words "shall lade the same," and made it perfectly clear that the exemption applies whether the goods are carried as cargo or as baggage.

§ 182[5]

Loss by Fire

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which

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[5] Originally enacted in 1851 as Section 1; unamended since 1874. R.S. 4282.

The Fire Statute is not to be strictly construed: Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S.

may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by

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249, 64 S.Ct. 15, 88 L. Ed. 30, 1943 A.M.C. 1209 (1943); American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449, 1951 A.M.C. 1933 (2d Cir. [N.Y.] 1951), *cert. denied*, 343 U.S. 978 (1952). *Cf.* Hoskyn & Co. v. Silver Line, 63 F. Supp. 452, 1943 A.M.C. 224 (S.D.N.Y. 1943), *aff'd*, 143 F.2d 462, 1944 A.M.C. 895 (2d Cir. [N.Y.]), *cert. denied*, 323 U.S. 767 (1944), suggesting that the statute is to be strictly construed as a statute of exoneration rather than of limitation, relieving the owners of liability in the absence of proof that the fire was caused by the design or neglect of the owners.

Where the cause of a disastrous ship fire might or might not have been due to spontaneous combustion in a shipment of ammonium nitrate fertilizer, the shipowner's defenses of the Fire Statute and the fire provisions of the Carriage of Goods by Sea Act were held good upon a showing that the stowage and ventilation of the cargo were in accordance with all information available at the time of shipment and upon the advice of government and underwriters' experts: A/S J. Ludwig Mowinckels Rederi v. Accinanto, Ltd., 199 F.2d 134, 1952 A.M.S. 1681 (4th Cir. [Md.] 1952), *cert. denied*, 345 U.S. 992 (1953).

The protection of the statute extends not only to the owner and the charterer of the vessel but to the vessel itself and no maritime liens for cargo damage by fire can be asserted against the vessel in the absence of proof that the fire was caused by the design or neglect of the owner or charterer: Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249, 64 S.Ct. 15, 88 L. Ed. 30, 1943 A.M.C. 1209 (1943). *Cf.* Rockwood & Co. v. American President Lines, 69 F. Supp. 224, 1946 A.M.C. 1526 (D. N.J. 1946); Hygrade No. 18, 41 F. Supp. 304, 1941 A.M.C. 1868 (D. Mass. 1941).

The burden of proof that the fire was caused by the design or neglect of the owner is on the complainant; mere proof of unseaworthiness of the vessel due to the neglect of the owner without proof that such unseaworthiness was the cause of the

reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.

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fire does not deprive the owner of the benefit of the statute: Hoskyn & Co. v. The Silver Line, 143 F. 2d 462, 1944 A.M.C. 895 (2d Cir. [N.Y.]), *cert. denied*, 323 U.S. 767 (1944). After the neglect of the responsible agent of a corporate owner has been established, the carrier has the burden of establishing what if any part of the fire damage was not caused by such neglect: Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 159 F.2d 661 (2d Cir. [N.Y.]), *cert. denied*, 331 U.S. 836 (1947).

A cargo owner's burden of proof was held sustained and its theory of the cause of the fire (negligent stowage of chemicals) was deemed to be "significantly more probable" than the theory of the shipowner (unpermitted smoking by longshoremen and others) in a case where the cause of the fire could not be shown by testimony of eyewitnesses. An employee of the shipowner, sent to Europe to expedite and assist in the handling of ships and stowage of cargo, was held to be a managerial agent of the shipowner and his privity and knowledge as to the dangerous stowage was the privity and knowledge of the shipowner: Petition of Isbrandtsen Co. (The Edmund Fanning), 105 F. Supp. 353, 1952 A.M.C. 1147 (S.D.N.Y. 1952), *aff'd on this point but modif'd on other grounds at* 201 F.2d 281, 1953 A.M.C. 86 (2d Cir. [N.Y.] 1953).

To deprive a shipowner of the benefit of the Fire Statute, the cargo owner must prove by positive testimony (1) the cause of the fire, (2) the existence of design or negligence, and (3) that such design or negligence was that of the owner himself or his managing agent. If the proof leaves the origin of the fire a matter of speculation the Fire Statute prevents a recovery: Connell Bros. (Canada) Ltd. v. Sevenseas Trading & Steamship Co., 111 F. Supp. 227, 1953 A.M.C. 837 (N.D. Calif. 1953), *reversed in part at* 220 F.2d 511, 1955 A.M.C. 835 (9th Cir. 1955), as to sustaining burden of proof.

Historical Note to § 182

The above section is substantially the same as that originally enacted as section 1 of the Act of March 3, 1851, Chap. 43, 9 Stat. 635. The following proviso which appeared in the Act of 1851 was deleted by the general repealer section of the Revised Statutes, 1874 (R. S. 5596): "Provided that nothing in this Act contained shall prevent the parties from making such contracts as they

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A deviation does not deprive a shipowner of the benefit of the Fire Statute unless the cargo sustains the burden of proof that there was a causal connection between the deviation and the fire: Haroco Co. v. The Tai Shan, 111 F. Supp. 638, 1953 A.M.C. 887 (S.D.N.Y. 1953), *aff'd*, 218 F.2d 822 case 2, 1955 A.M.C. 420 (2d Cir. 1955).

The neglect of the owner to which the statute refers means personal negligence, or in the case of a corporate owner, negligence of the managing officers and agents as distinguished from that of the master and his subordinates: Consumers Import Co. v. Kabushiki Kaisha Kawasaki Zosenjo, 320 U.S. 249, 64 S.Ct. 15, 88 L. Ed. 30, 1943 A.M.C. 1209 (1943). Negligence of a corporate shipowner's port engineer whose duties were to board all ships on arrival, requisition repairs and make repair arrangements with shipyards, with final authority in engineering matters, held sufficient to preclude exoneration: Great Atlantic & Pacific Tea Co. v. Lloyd Brasileiro, 159 F.2d 661 (2d Cir. [N.Y.]), *cert. denied*, 331 U.S. 836 (1947), *reversing* the Pocone, 1946 A.M.C. 821 (E.D.N.Y. 1946).

Exoneration under the Fire Statute does not extend to the loss of over-carried cargo as to which a deviation has occurred: Hoskyn & Co. v. The Silver Line, 63 F. Supp. 452, 1943 A.M.C. 510 (S.D.N.Y. 1943), *aff'd*, 143 F.2d 462, 1944 A.M.C. 895 (2d. Cir.), *cert. denied*, 323 U.S. 767 (1944).

Damage caused by heat from electric lights is not damage by fire within the meaning of the statute: 34 F. Supp. 344, 1941 A.M.C. 1239 (W.D.N.Y. 1941).

please, extending or limiting the liability of shipowners." In 1874, also various redundant words were omitted, and the section became R.S. 4282.

As enacted in 1851, this section applied to "goods and merchandise," which was held to include passengers' baggage.[6] The amendment of 1874 struck out the reference to "goods" and the section had subsequently been held not to apply to baggage.[7] It applies to every other species of merchandise on board.

The effectiveness of this section was especially preserved against any implied repeal by section 8 of the Carriage of Goods by Sea Act, 1936. That Act also confers similar immunity against fire loss of bill of lading merchandise, in section 4, subsection 2(b).

§ 183

Amount of Liability

(a) *Privity or knowledge of owner; limitation.* The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value

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[6] Chamberlain v. Western Trans. Co., 44 N.Y. 305 (1871).

[7] The Marine City, 6 F. 413 (D. Mich. 1881).

of the interest of such owner in such vessel, and her freight then pending.[8]

(b) *Seagoing vessels; losses not covered in full.* In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in portion to their respective amounts.[9]

(c) *Tonnage of seagoing vessels.* For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided,* That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.[10]

(d) *Loss of life or bodily injury arising on distinct occasions.* The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on

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[8] Originally enacted in 1851, as Section 3; amended in 1873, 1935 and 1936. R.S. 4283(a).

[9] Originally enacted in 1935; amended in 1936. R.S. 4283(b).

[10] Originally enacted in 1935; amended in 1936. R.S. 4283(c).

distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.[11]

(e) *Privity imputed to owner.* In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.[12]

(f) *"Seagoing vessel" defined.* As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.[13]

(R.S. § 4283; Aug. 29, 1935, ch. 804, § 1, 49 Stat. 960; June 5, 1936, ch. 521, § 1, 49 Stat. 1479; Oct. 19, 1984, Pub. L. 98-498, title II, § 213(a). 98 Stat. 2306.)

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[11] Originally enacted in 1935; amended in 1936. R.S. 4283(d).

[12] Originally enacted in 1935; amended and reenacted in 1936. R.S. 4283(e).

[13] Originally enacted in 1936. R.S. 4283(f).

The term "tank vessels" refers only to tankers of "the river or harbor type" and does not include ocean going tankers: Petition of Panama Transportation Co. (J.H. Senior), 73 F. Supp. 716, 1947 A.M.C. 651 (S.D.N.Y. 1947); Petition of Dodge, Inc., 282 F.2d 86, 1961 A.M.C. 233 (2d Cir. [N.Y.] 1960).

Historical Note to § 183

Subsection (a). The above section is the same, except for minor verbal changes, as section 3 of Act of 1851. But its present effect has been profoundly altered by subsections (b), (c), (d), (e) and (f), enacted in 1935 and 1936, which follow.

In *Butler v. Boston, S.S. Co.*[14] it was decided that this section applies to bodily injury and death claims, as well as to damage to property. In *Norwich Co. v. Wright*[15] Mr. Justice Bradley pointed out that this section does not

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[14] 130 U.S. 527, 9 S. Ct. 612, 32 L. Ed. 1017 (1889). See, also, The H.S., Inc. No. 72, 130 F.2d 341, 1942 A.M.C. 1424 (3d Cir. [N.J.] 1942).

[15] 80 U.S. 104, at 120, 20 L. Ed. 585 (1871).

The courts have always construed the term "owner" in 46 U.S.C. § 183 very broadly, in order to effectuate the congressional intent: Flink v. Paladini, 279 U.S. 59, 49 S. Ct. 255, 73 L. Ed. 613, 1929 A.M.C. 327 (1929); Standard Oil Co. of New Jersey v. Southern Pacific Co., 268 U.S. 146, 45 S. Ct. 465, 69 L. Ed. 890, 1925 A.M.C. 779 (1925); Admiral Towing Co. v. Woolen, 290 F.2d 641, 1961 A.M.C. 2333 (9th Cir. [Cal.] 1961); Austerberry v. United States, 169 F.2d 583, 1948 A.M.C. 1682 (6th Cir. [Mich.] 1948); In re Trojan, 167 F. Supp. 576, 1959 A.M.C. 201 (N.D. Cal. 1958); Petition of the Colonial Trust (Yacht Charlotte), 124 F. Supp. 73, 1955 A.M.C. 1290 (D. Conn. 1954). These cases have held such diverse parties as shareholders, prior vendors, life tenants, trustees and government agencies operating privately owned ships in wartime to be "owners" entitled to limit liability. The rule which has emerged is that if the petitioner may be held liable because of his ownership or control of the vessel, he can maintain a petition to limit liability: Petition of Barracuda Tanker Co. (Torrey Canyon), 281 F. Supp. 228, 1968 A.M.C. 1711 (S.D.N.Y. 1968), *modified*, 409 F.2d 1013 (2d Cir. 1969).

define the time when the "interest" of the owner shall be measured; and the Supreme Court subsequently adopted the rule of the general (or continental maritime law, as opposed to the English rule and took the value of the owner's "interest" as the value of the vessel at the end of the voyage.[16] The voyage ends when the vessel reached the discharging place, is safetly moored and ready for unloading.[17] In *Ex parte Phenix Insurance Co.*,[18] Mr. Justice Blatchford pointed out that this section does not confer any jurisdiction on a district court. That, however, has now been done by R. S. 4285 as amended in 1936.

Subsection (b). The Committee on Merchant Marine and Fisheries of the House of Representatives held extensive hearings in 1935 and 1936 to consider amendments to the law as the result of public agitation over the Morro Castle and Mohawk disasters of September 8, 1934 and January 24, 1935 respectively. The principle of the foregoing section was expressed in the Act of August 29, 1935, c. 804[19]) hastily enacted in the closing moments of the 1935 session and, after further hearings, was re-phrased for purposes of clarification in the Act of June 5, 1936, c. 521.[20]

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[16] The City of Norwich, 118 U.S. 468, 6 S. Ct. 1150, 30 L. Ed. 134 (1886): The Great Western, 118 U.S. 520, 525, 6 S. Ct. 1172, 30 L. Ed. 156 (1886).

[17] The Pelotas, 21 F.2d 236, 1927 A.M.C. 1347 (E.D. La. 1927).

[18] 118 U.S. 610, 7 S. Ct. 25, 30 L. Ed. 274 (1886).

[19] Act of August 29, 1935, c. 804, 49 Stat. at L. 960, 1935 A.M.C. 1261 (1935).

[20] Act of June 5, 1936, c. 521, 49 Stat. at L. 1479, 1936 A.M.C. 920 (1936).

It appears that only one case requiring the interpretation of the Act of August 29, 1935, came to the attention of the courts during the nine months that this Act was in effect.[21] In that case, a freight steamer was wholly lost on the Columbia River bar on January 12, 1936, as she was putting to sea on an intercoastal voyage with a large cargo and a crew of 34 men, all of whom were lost. The owner, petitioning for limitation of liability, furnished a stipulation for $10,624 as the appraised value of the wreck and the freight; this was less than $60 per ton of vessel's gross tonnage. The court approved the stipulation, issued the usual injunction and restraining order, and over-ruled motions to vacate the order of approval and the injunction. A Commissioner's report subsequently held the shipowner without privity for such negligence as was found, and entitled to limit its liability.[22]

The prospective operation of this section in its present form was described as follows in the Report of the Committee of the House of Representatives which reported the Bill favorably for passage:[23]

> "If under the old law the sum available for the payment of all claims should be $20,000 (such sum being the amount paid into court by the owner, or in case the owner has elected to surrender his vessel to a trustee, the proceeds of the sale of the vessel by the trustee), the cargo claimants and the claimants for loss of life and bodily injury would be entitled to share *pro rata*

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[21] The Iowa, 1936 A.M.C. 1340 (D. Ore. 1936).

[22] The Iowa, 1938 A.M.C. 615 (D. Ore. 1938).

[23] H.R. No. 2517, 74th Congress, 2d Session (1936).

in such sum. Hence it would be determined at some stage of the limitation of liability proceedings from the number and amounts of loss of life, bodily injury, and cargo claims, what portion of the $20,000 would be applicable to the payment of claims for loss of life, and bodily injury. When that portion is determined, if it is found that it is less than an amount equal to $60 for each ton of the vessel, such portion must be increased to an amount equal to $60 per ton, and as so increased would be available only for the payment of loss of life and bodily injury claims. The portion of the $20,000 found applicable to the payment of cargo claims would remain just as it was under the old law. Hence if the tonnage of the vessel were 1,000 tons, and the amount available for distribution under the old law were $20,000, and the amount of approved loss of life and bodily injury claims were $60,000, and the amount of approved cargo claims were $20,000, three-fourths of the $20,000 available for distribution, i. e., $15,000, would be applicable to the payment of loss of life and bodily injury claims, and one-fourth of the $20,000 available for distribution, i.e., $5,000, would be applicable to the payment of cargo claims. The cargo claimants would receive $5,000, the amount they would have received under the old law, but the loss of life and bodily injury claimants would be paid in full, i.e., $60,000, because the $15,000 applicable to the payment of their claims is less than $60 per ton of the vessel's tonnage, and under subsection (b) must be increased to that amount. If it should be determined under the old law that the portion of the amount available for distribution applicable to the payment of claims for loss of life and bodily

> injury is more than an amount equal to $60 per ton, subsection (b) will not operate. In other words, in cases where the owner is permitted to limit his liability, subsection (b) guarantees to loss of life and bodily injury claimants at least $60 per ton."

The meaning of the word "seagoing" is not discussed in the Report. See § 47 *infra*.

Subsection (c). The foregoing section, which does not follow the British formula of the registered or net tonnage, plus the engine room spaces, was first found in the Act of August 29, 1935, and was re-enacted, with the addition of the word "seagoing," in the Act of June 5, 1936.

The method of measuring the gross tonnage of a vessel is stated in R. S. 4135, 46 U.S.C. § 77. Subsection (a) relates to measurement of spaces occupied by and appropriated to the use of the "crew," and the context indicates that the words "crew" and "seamen and apprentices" are synonymous. The space occupied by the master is separately measured according to subsection (b) and hence would not be deducted in arriving at the limitation tonnage. The measurement of foreign ships is provided for in R. S. 4154, 46 U.S.C. § 81.

The meaning of the word "seagoing" is discussed hereinafter, at § 47. See 46 U.S.C. § 183(f).

Subsection (d). This section was first enacted in the Act of August 29, 1935, and re-enacted, with clarifying changes, in the Act of June 5, 1936. It accepts the principle of the British statute and the Brussels Convention, but applies it merely as to death and bodily injury claimants.

The accommodation of this new rule to the "voyage" rule which still applies to all other classes of claims is discussed in § 53 *infra*.

Subsection (e). This section first appears as section 2 of the Act of August 29, 1935, where the expression used was the "*actual* privity or knowledge" of the master, etc. At subsequent hearings conducted by the House Committee on Merchant Marine and Fisheries under the caption "Safety of Life and Property at Sea," Part 4, on February 19, 20 and 21, 1936, it was pointed out,[24] that this apparent adaptation of the corresponding phrase "actual fault or privity" of the British Merchant Shipping Act, 1894, § 503, might overrule or limit the application of some of the American cases as to the nature of privity. *See* §§ 41 and 42 *infra*. The entire section of the 1935 Act was therefore expressly repealed (and not merely amended) by section 5 of the Act of June 5, 1936, and at the same time was re-enacted in section 1(e) of that same Act with the identical text of the 1935 Act, merely omitting the word *actual*.

A proposal to amend the Act of 1935 by coupling the words "actual or constructive," qualifying the words "privity or knowledge," was not adopted in the 1936 bill. It has been argued that this deliberate omission of the word "actual" denotes that it was the intent of Congress that privity or knowledge of the master, superintendent or managing agent may be found constructively or implied. The record, however, rather indicates that congress, feeling that the insertion of the word "actual" in

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[24] At pages 3-5, 23-27, 33-35, 50, 75-78, 153-154, 160-165.

the Act of 1935, might have altered the existing case law, simply struck it out in order to restore the situation which had previously existed. *See* §§ 41 and 42 *infra*.

Subsection (f). This section must be read in connection with § 188. The Act of August 29, 1935 applied the new $60 rule to "any seagoing sailing, steam or motor vessel, whether American or foreign, other than tugs, barges, fishing vessels and their tenders." At subsequent hearings, in 1936, witnesses speaking for owners of industrial river and harbor "marine equipment" were heard who sought exemption from the $60 rule for such vessels. They submitted a formula designed to have this result, and their formula was embodied in the Act of June 5, 1936. All of the exceptions would therefore appear intended to refer to local harbor and inland types of "marine equipment." The expression "tank vessels," considered out of the context, is broad enough to include the generality of vessels fitted with tanks for the carriage of liquid cargoes in bulk. However, no witness ever suggested that ocean-going tankers should be excluded from the operation of the $60 rule; and in the light of the testimony given on February 19, 20 and 21, 1936, before the House Committee on Merchant Marine (and especially at page 81) it would seem clear that only harbor and river tank vessels for local handling of liquid products are intended. *See* § 47 *infra*.

§ 183[25]

Privity or Knowledge of Master, Superintendent, or Managing Agent Imputed to Owner

REPEALED

§ 183B[26]

Stipulations Limiting Time for Filing Claims and Commencing Suit

(a) It shall be unlawful for the manager, agent, master, or owner of any sea-going vessel (other than tugs, barges, fishing vessels and their tenders) transporting passengers or merchandise or property from or between ports of the United States and foreign ports to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of, or filing claims for loss of life or bodily injury, than six months, and for the institution of suits on such claims, than one year, such period for institution of suits to be computed from the day when the death or injury occurred.

(b) *Claims not barred for failure to give notice.* Failure to give such notice, where lawfully prescribed in such contract, shall not bar any such claim –

(1) If the owner or master of the vessel or his agent had knowledge of the injury, damage, or loss and the court determines that the owner has not been prejudiced by the failure to give such notice; nor

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[25] Originally enacted in 1935. Repealed by Act of June 5, 1936, c. 521, § 5, 49 Stat. 1481. Similar provisions are now contained in 46 U.S.C. § 183(e), *supra*.

[26] Originally enacted in 1935. R.S. 4283A.

(2) If the court excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor

(3) Unless objection to such failure is raised by the owner.

(c) If a person who is entitled to recover on any such claim is mentally incompetent or a minor, or if the action is one for wrongful death, any lawful limitation of time prescribed in such contract shall not be applicable so long as no legal representative has been appointed for such incompetent, minor, or decedent's estate, but shall be applicable from the date of the appointment of such legal representative: *Provided, however,* That such appointment be made within three years after the date of such death or injury.

§ 183c[27]

Stipulations Limiting Liability for Negligence Invalid

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen,

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[27] Originally enacted in 1936, R.S. 4283B.

weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure of damages therefor. all such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

§ 184[28]

Apportionment of Compensation

Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and, her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto.

Historical Note to § 184

The above section, with only minor verbal changes, is the same as the first sentence of section 4 of the Act of 1851, codified in 1874 as R.S. 4284. The amendments

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[28] Originally enacted in 1851, as Section 4, first sentence. Unamended since 1877. R.S. 4284.

made in 1877 [29] were unimportant.[30] In *Butler v. Boston S.S. Co.*,[31] it was pointed out that this section, and the next one, were obviously incomplete.

§ 185[32]

Petition for Limitation of Liability; Deposit of Value of Interest in Court; Transfer of Interest to Trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, as in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements

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[29] Act of February 27, 1877, c. 69, § 1; 19 Stat. at L. 251.

[30] *See* § 185, note, *infra*.

[31] 130 U.S. 527, 9 S. Ct. 612, 21 L. Ed. 1017 (1889).

[32] Originally enacted in 1851, as Section 4, second sentence. Amended in 1873 and 1936. R.S. 4285.

of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

Historical Note to § 185

The foregoing section was wholly re-cast by the Act of June 5, 1936. The previous text, originally enacted as the second sentence of section 4 of the Act of 1851, and codified, with slight changes in phraseology, in 1874 as R.S. 4285, read as follows:

> "**R.S. 4285.** Transfer of interest of owner to trustee. It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability for any embezzlement, loss or destruction, of any property, goods or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; from and after which transfer all claims and proceedings against the owner shall cease."

It will be noted that this section, authorizing an owner to transfer his interest to a trustee, applied in express terms only to liability for any embezzlement, loss or destruction of any property, goods or merchandise; it was argued that by implication therefore liability for personal injuries is excluded. How ever, Bradley, J., in *Butler v. Boston S.S. Co.*,[33] implied that this section and R.S. 4284 (section 184) were incomplete, and held that

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[33] 130 U.S. 527, 550-52, 9 S. Ct. 612, 32 L. Ed. 1017 (1889).

they did not limit the application of the limitation of liability statutes, and particularly the application of 46 U.S. Code 183, R.S. 4283, merely to claims for damaged property.

The text enacted in 1936 omits the restricting words "embezzlement, loss, or destruction of any property, goods or merchandise" and thus broadens the statutory language to accord with the broad interpretation given to the original language by Mr. Justice Bradley in 1889.

The Bill, which resulted in the Act of 1936, originally proposed that the petition should be filed, if at all, within three months. Witnesses pointed out the inconvenience of compelling the shipowner to make up his mind as to filing a limitation petition prior to the time when the claimants have to make up their minds whether to sue. The House Committee, however, extended the time only to six months, which is less than the time allowed for bringing suits under any category of action.

§ 186[34]

Charterer May Be Deemed Owner

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

Historical Note to § 186

The above section is the same as section 5 of the Act of 1851, and was re-enacted as R.S. 4286, in 1874. *See* § 44 *infra.* Parliament similarly extended the benefit of the British limitation statute to demise charterers in 1906 in the Merchant Shipping Act.[35]

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[34] Originally enacted in 1851, as Section 5; unamended. R.S. 4286.

A bareboat charterer may petition to limit his liability: Petition of Russell Brothers, 199 F. Supp. 442, 1962 A.M.C. 136 (S.D.N.Y. 1961).

A "Sale-leaseback" charterer whose twenty-year charter specifically stated that "Nothing herein contained shall be construed as creating a demise of the Vessel to the Charterer" is not the kind of charterer comprehended by 46 U.S.C. § 186: Petition of Barracuda Tanker Co. (Torrey Canyon), 281 F. Supp. 228, 1968 A.M.C. 1711 (S.D.N.Y. 1968), *modified*, 409 F.2d 1013 (2d Cir. 1969).

[35] The Merchant Shipping Act, 6 Edw. 7, c. 48, s. 71 (1906).

§ 187[36]

Remedies Reserved

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

§ 188[37]

Limitation of Liability of Owners Applied to All Vessels

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

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[36] Enacted in 1851, as Section 6; unamended. R.S. 4287. The above section is the same as section 6 of the Act of 1851, codified in 1874 as R.S. 4287, except that in the original "sections 182, 183, 184, 185, and 186 of this title" read "the five preceding sections" and referred to R.S. §§ 4283-4286.

[37] Originally enacted in 1851, as Section 7, second sentence; amended in 1875, 1886 and 1936. R.S. 4289.

Historical Note to § 188

This section must be read together with § 183(f).

Section 7 of the Act of 1851, originally provided that

> "This Act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

An amendment in 1875[38] made merely verbal changes of no importance. The Act of 1886[39] was intended to extend the limitation statutes to all vessels of every kind, with the following text:

> "The provisions of the six preceding sections, and of sections 175 and 189, shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

The text achieved its present form by amendment in the Act of June 5, 1936, after hearings and a consideration of many letters.[40]

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[38] Sec. 1 of the Act of February 18, 1875, c. 80; 18 Stat. at L. 320.

[39] Sec. 4 of the Act of June 19, 1886, c. 421; 24 Stat. at L. 80.

[40] Safety of Life and Property at Sea, Part 4, on amending the Limited Liability Act, February 19, 20, 21, 1936, pp. 1-155. Parliament similarly extended the operation of the British limitation statute to vessels of all kinds in 1921 (11 & 12 Geo. V, ch. 28). *See* § 47 *infra*.

§ 189[41]

Limitation of Liability of Owners of Vessels for Debts

The individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: *Provided,* That this provision shall not prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said shipowners.

Historical Note to § 189

This is the Act of 1884. It was passed after the compilation of the Revised Statutes; no amendments were made before including it in the U.S. Code. The object of the section was to do away with restrictions on the character of debts and liabilities against which limitation might be asserted, except as to seamen's wages. The section extends the limitation statutes to both maritime and non-maritime matters as to claims arising *ex contractu* and *ex delicto.* Lurton, J., in the case of *Richardson v. Harmon*[42] says: "That this provision is not as definite as might be desirable may be conceded." The Act of 1884 did not repeal or amend the Act of 1851; it was an additional enactment, *in pari materia.*[43] Despite its broad

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[41] Originally enacted in 1884; unamended. 23 Stat. 57.

[42] 222 U.S. 96, 102, 32 S. Ct. 27 56 L. Ed. 110 (1911).

[43] *See* §§ 15 and 73, *infra.*

language, the courts have found reasons for declining to permit limitation of some types of liability.[44]

Rules of Court for Administering Proceedings Under the Act.

Interpretation of the foregoing statutes has not been free from difficulty. These statutes are general rather than specific, and their brevity does not improve their clarity. The original methods of administration were tentative and had gradually to be clarified by a series of decisions. In *Norwich Co v. Wright*,[45] the Supreme Court said, concerning the administration of relief under the Act of 1851, that "no court is better adapted than a court of admiralty to administer precisely such relief," and then first outlined the procedure for limitation poceedings [sic]. On May 6, 1872, it promulgated Admiralty Rules 54-57 prescribing the practice in such proceedings.[46] In the *Hill* case[47] the court upheld its power to make these rules on the ground that the subject was "one pre-eminently of admiralty jurisdiction," pp. 593-94. These rules, with slight amendments, were carried over into Admiralty Rules 51-54, promulgated December 6, 1920.[48] In *Ex parte Phenix Insurance Co.*,[49] Mr. Justice Blatchford pointed out that the Rules did not enlarge the jurisdiction of the

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[44] *See* §§ 31-33; *infra*.

[45] 80 U.S. 104 at 123, 20 L. Ed 585 (1871).

[46] Admiralty Rules 54-57, 80 U.S. pp. xiii-xiv.

[47] Providence & N.Y.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 590-93, 3 S. Ct. 379, 27 L. Ed. 1038 (1883).

[48] Admiralty Rules 51-54, 254 U.S. Appendix, pp. 25-28.

[49] 118 U.S. 610, at 619, 7 S. Ct. 25, 30 L. Ed. 274 (1886).

district courts; specifically, the Rules of 1872, with reference to the Act of 1851, did not authorize a limitation injunction against suits for non-maritime torts committed in 1880. The fact that Congress had extended the scope of the statutes in 1884 to include non-maritime torts seems to have escaped notice in the discussion in 1886; and the Supreme Court did not rule on this point until 1911, in *Richardson v. Harmon.*[50]

General Admiralty Rules 51-54 were rescinded in 1966 by the merger of civil and admiralty rules. Current practice under the Limitation of Liability Act is governed by Supplemental Admiralty Rule F.[51]

TEXT OF SUPPLEMENTAL RULE F[52]

(1) *Time for Filing Complaint; Security.* Not later than six months after his receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of his interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as

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[50] 222 U.S. 96, 32 S. Ct. 27, 56 L. Ed. 110 (1911).

[51] Supp. Adm. Rule F. Fed. R. Civ. P., 28 U.S.C. All of the former Admiralty Rules are reproduced in Volume 5.

[52] The complete text of all Supplemental Admiralty Rules can be found in Vol. 5.

amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 per cent per annum from the date of the security.[53]

(2) *Complaint.* The complaint shall set forth the facts on the basis of which the right to limit liability is asserted, and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage, if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the

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[53] *Advisory Committee's Note.* The amendments of 1936 to the Limitation Act superseded to some extent the provisions of Admiralty Rule 51, especially with respect to the time of filing the complaint and with respect to security. The rule here incorporates in substance the 1936 amendment of the Act (46 U.S. Code, sec. 185) with a slight modification to make it clear that the complaint may be filed at any time not later than six months after a claim has been lodged with the owner.

voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount lien thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.[54]

(3) *Claims Against Owner; Injunction.* Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.[55]

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[54] *Advisory Committee's Note.* Derived from Admiralty Rules 51 and 53.

[55] *Advisory Committee's Note.* This is derived from the last sentence of 46 U.S. Code, sec. 185 and the last paragraph of Admiralty Rule 51.

Guam Bear, 43 F.R.D. 283, 1968 A.M.C. 524 (N.D. Cal. 1967) (For the purposes of a limitation of liability proceedings, Supplemental Admiralty Rule F, with respect to injunctions, replaces the notice and 10-day limit requirements of F.R.C.P. 65.).

(4) *Notice to Claimants.* Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.[56]

(5) *Claims and Answer.* Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of his claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest

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[56] *Advisory Committee's Note.* Derived from Admiralty Rule 51.

either the right to exoneration from or the right to limitations of liability he shall file and serve an answer to the complaint unless the claim has included an answer.[57]

(6) *Information To Be Given Claimants.* Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant himself) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if he is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury, etc., and (d) the amount thereof.[58]

(7) *Insufficiency of Fund or Security.* Any claimant may be [sic] motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security by [sic] increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the

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[57] *Advisory Committee's Note.* Derived from Admiralty Rules 52 and 53.

[58] *Advisory Committee's Note.* Derived from Admiralty Rule 52.

court may similarly order that the deposit or security be increased or reduced.[59]

(8) *Objections to Claims: Distribution of Fund.* Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.[60]

(9) *Venue; Transfer.* The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suite has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall

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[59] *Advisory Committee's Note.* Derived from Admiralty Rule 52 and U.S. Code, sec. 185.

[60] *Advisory Committee's Note.* Derived from Admiralty Rule 52.

dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.[61]

CIRCUIT COURT OF APPEALS RULES

None of the Circuit Court of Appeals Rules relate specifically to limitation of liability proceedings.

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[61] *Advisory Committee's Note.* Derived from Admiralty Rule 54. The provision for transfer is revised to conform closely to the language of 28 U.S. Code secs. 1404(a) and 1406(a), though it retains the existing rule's provision for transfer to any district for convenience. The reason also makes clear what has been doubted that the court may transfer if venue is wrongly laid.

LIMITATION OF LIABILITY AND THE DIRECT ACTION STATUTE: A TROUBLED MARRIAGE

*Chester D. Hooper**

Ironically, direct action statutes[1] seem to have bestowed on underwriters and removed from the legislatures and the

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[1] While a number of states have enacted direct action statutes, more maritime cases arise under Louisiana's direct action statute than other states' enactments. Louisiana's direct action statute provides in relevant part:

> B. (1) The injured person or his or her survivors or heirs . . . at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido. . . .
>
> (2) This right of direct action shall exist . . . whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the state of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if such provisions are not in violation of the laws of this state.
>
> C. It is the intent of this Section that any action brought under the provisions of this Section shall be subject to all of the lawful conditions of the policy or

courts much of the authority to determine who may limit the underwriter's liability and the amount of the limitation. This irony is due to the courts' eagerness to apply the direct action remedy as widely as possible to resolve limitation proceedings as they, rather than Congress, wish to resolve them. This eagerness has been bound only by the four corners of the insurance contract. Insurers have thus been left to set the limits in the terms of their insurance contracts.

This ironic position seems to have evolved from a desire to prevent an insurer from denying an injured person the ability to collect the proceeds of an insurance policy which might have been bought for the injured person's benefit. This desire is reasonable in an automobile accident setting. A state may have required a motorist to purchase insurance to pay for injuries the motorist may inflict on others. If the motorist does injure someone, the injured person should not be denied compensation simply because he or she could not find and serve process on the insured motorist. The victim should be able to sue the insurer directly.

> contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.
>
> D. It is also the intent of this Section that all liability policies within their terms and limits are executed for the benefit of all injured persons and their survivors or heirs to whom the insured is liable; and, that it is the purpose of all liability policies to give protection and coverage to all insureds . . . for any legal liability said insured may have as or for a tortfeasor within the terms and limits of said policy.

La. R.S. 22:655 (1977 & Supp. 1994).

The direct action theory does not make as much sense in an admiralty context, particularly when it is used to circumvent limitation of liability.[2] The marine insurance authority, Leslie J. Buglass, has noted:

> Several states in the United States have direct action statutes which permit claims to be pursued directly against underwriters for damages recoverable against a shipowner, even though such damages may exceed that shipowner's limitation fund. The startling philosophy (from

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[2] The original Limitation of Shipowners' Liability Act, 46 U.S.C. app. §§ 181-188 (1988 & Supp. V 1993) (hereinafter the Limitation Act), enacted in 1851, "provides a procedure in admiralty to enjoin all pending suits and to compel them to be filed in a special limitation proceeding so that liability may be determined and limited to the value of the shipowner's vessel and freight pending." The idea's origin can be traced back to the medieval sea codes. "Its justification was that running a ship was an inherently risky business, a fact well known to all parties to a marine venture, and the imposition of full and one-sided liability on a shipowner would discourage maritime commerce." 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 15, at 298-99 (1987).

The Limitation Act provides in relevant part:

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. § 183(a) (1988).

> underwriters' viewpoint) behind such statutes is that liability insurance is for the benefit of the injured party rather than for the protection of the assured.[3]

A glimpse of some rationale used in attempts to interpret the limitation issue and the direct action issue may show how these issues have become intertwined and, at times, almost strangled each other. The United States Supreme Court has said:

> We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat the principal object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment. Now to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping

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[3] Leslie J. Buglass, Marine Insurance and General Average in the United States 434 (3d ed. 1991).

> business. It would virtually and in effect bring back the law to the English rule, by which the owner is made liable for the value of the ship before collision – the very thing which, in all our decisions on the subject, we have held it was the intention of Congress to avoid by adopting the maritime rule. That this would be the result is evident, because all shipowners insure the greater part of their interest in the ship, and by losing their insurance they would lose the value of their ship in every case. No form of agreement could be framed by which they could protect themselves. This is a result entirely foreign to the spirit of our legislation.[4]

The United States Fifth Circuit Court of Appeals in *Olympic Towing Corp. v. Nebel Towing Co.*[5] said:

> Underlying this principle [of direct action] is the public policy of Louisiana which proclaims that liability insurance – including purported indemnity insurance – is issued primarily for the protection of the public rather than the insured. We think it clear, therefore, that the clause relied upon here does not preclude a direct action.

The dissenting opinion in Nebel Towing Co. quoted the very language of Louisiana's direct action statute:

> It is also the intent of this section that all liability policies *within their terms and limits* are

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[4] Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 504-05, 6 S. Ct. 1150, 1163 (1886) [hereinafter *City of Norwich*].

[5] 419 F.2d 230, 237, 1969 A.M.C. 1571, 1580 (5th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S. Ct. 1120 (1970), *overruled by* Crown Zellerbach Corp. v. Ingram Indus., Inc., 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

> executed for the benefit of all injured persons * * * and that it is the purpose of all liability policies to give protection and coverage to all insureds * * * for any legal liability said insured may have as or for a tort-feasor *within the terms and limits of said policy.*[6]

The same dissenting opinion went on to state:

> As long as the Direct Action Statute subjects the insurer to no greater liability than the assured would have, it fulfills the Louisiana policy of public protection and avoids troublesome questions of conflict between state and federal maritime law. The Court's reading rewrites the contract, imposes liability beyond that of the assured and ignores substantive limitations on liability under maritime principles. The essential uniformity of the admiralty is at an end when for a like casualty across the line in Texas the "liability" of the shipowner is less – by the amount of total damages and the policy limits – than it is in Louisiana.[7]

Another Fifth Circuit dissenting opinion has said:

> Although the trial court, having been *Nebel*-awed, presumably thought that anything which forbade 100% recovery was somehow outlawed, it is plain that application of any such approach would produce absurd results which even the most potent *Nebelizer* would protest.[8]

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[6] *Id.* at 241 (Brown, C.J., dissenting from a denial of rehearing) (quoting the Louisiana direct action statute).

[7] *Id.* at 246 (Brown, C.J., dissenting from a denial of rehearing).

[8] Crown Zellerbach Corp. v. Ingram Indus., Inc., 745 F.2d 995, 1001 (5th Cir. 1984) (Brown, C.J., dissenting in part), *vacated*

The disputes concerning limitation and direct action statutes have not centered on the issue one might anticipate: whether an insurance company or even a protection and indemnity club might be sued directly. That aspect appears to have been settled.[9] Even protection and indemnity clubs may be sued directly despite the indemnity nature of the coverage.[10] The ability to sue even an indemnity insurer should satisfy the theory that insurance exists to protect injured persons. The direct action has, however, been used to obtain even more for the

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en banc, 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

[9] *See* Grubbs v. Gulf Int'l Marine, Inc., 625 So. 2d 495 (La. 1993). *Crown Zellerbach Corp.* quoted the following explanation from Hidalgo v. Dupuy, 122 So. 2d 639 (La. App. 1st Cir. 1960), which in turn quoted *Nebel Towing Co.*: "The statute simply voids any policy clause which conditions the right of the injured person to enforce against the insurer its contractual obligation to pay the insured's debt upon, as prerequisite, the obtaining by the injured person of a judgment against the insured." *Crown Zellerbach Corp.*, 783 F.2d at 1299, 1986 A.M.C. at 1476 (quoting *Hidalgo*, 122 So. 2d at 644-45).

[10] Typical protection and indemnity club rules provide:

> All insurance afforded by the Association is by way of indemnity. . . .
>
> If any Member shall incur liabilities, costs or expenses for which he is insured, he shall be entitled to recovery from the Association out of the funds . . . PROVIDED that actual payment (out of monies belonging to him absolutely and not by way of loan or otherwise) by the Member of the full amount of such liabilities, costs and expenses shall be a condition precedent to his right of recovery. . . .

The London Steam-Ship Owners' Mutual Insurance Association, R. 1.1, 3.1 and 3.1.1.

injured person than the law would require the insured to pay.

A return to the basic, straightforward explanation offered by Mr. Justice Bradley in *City of Norwich*[11] would help the "marriage" between direct action statutes and limitation. That case involved a collision on Long Island Sound between the steamboat City of Norwich and the schooner General S. Van Vilet. The owners of the steamboat filed a limitation petition. The issue discussed by the court and relevant to this article was whether insurance proceeds should be added to the limitation fund. The Supreme Court first reviewed the laws of the United States, England, Prussia, the German states, and France. After that review, the Court held insurance proceeds should not be added to the limitation fund.[12] The rationale used by the Court in that case should help resolve problems that are present today.[13]

The Court asked whether insurance should constitute a part of that interest and decided it should not:

> This view is corroborated by reference to a rule of law which we suppose to be perfectly well settled, namely, that the insurance which a person has on property is not an interest in the

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[11] 118 U.S. 468, 6 S. Ct. 1150 (1886).

[12] *Id.* at 493-502, 6 S. Ct. at 1156-61.

[13] The Court first looked to the Limitation Act, which was then only 35 years old. The Court noted: "The statute, section 4283, declares that the liability of the owner shall not exceed the amount or value of his interest in the vessel and her freight. . . ." *Id.* at 493, 6 S. Ct. at 1157. *See also supra* note 2.

> property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty, but not conferring upon him any interest in the property. That interest he has already, by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own, and it is manifest that this would give him no interest in the property.[14]

The Court was faced, in 1886, with the same emotional issues often faced today. The claimants stressed the hardship inflicted upon them. They argued it would be unjust to allow the shipowner to be entirely indemnified (by insurance) for the loss of his vessel while the parties who suffered loss due to the fault of the shipowner's employees would not be indemnified. The Supreme Court's answer to that argument was refreshing. It explained simply that the injured parties could have bought insurance themselves which would have indemnified them. The Court's rationale is quite clear and self-explanatory:

> It is not an irrelevant consideration in this regard, that the owner of the property is under no obligation to have it insured. It is purely a matter of his own option. And being so, it would seem to be only fair and right, and a logical consequence, that if he chooses to insure, he should have the benefit of the insurance. He does not take the price of insurance from the

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[14] *City of Norwich*, 118 U.S. at 494, 6 S. Ct. at 1157.

> thing insured, but takes it out of the general mass of his estate, to which his general creditors have a right to look for the satisfaction of their claims. They are the creditors who have the best right to the insurance.
>
> Stress is laid upon the hardship of the case. It is said to be unjust that the shipowner should be entirely indemnified for the loss of his vessel, and that the parties who have suffered loss from the collision by the fault of his employees should get nothing for their indemnity. This mode of contrasting the condition of the parties is fallacious. *If the shipowner is indemnified against loss, it is because he has seen fit to provide himself with insurance. The parties suffering loss from the collision could, if they chose, protect themselves in the same way. In fact, they generally do so; and when they do, it becomes a question between their insurers and the shipowner whether they or he shall have the benefit of his insurance. His insurers have to pay his loss. Why should not the insurers of the other parties pay their loss?* The truth is, that the whole question, after all, comes back to this: Whether a limited liability of shipowners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question.[15]

While the *City of Norwich* Court quite clearly held that insurance proceeds should not be part of, and thus should not increase the limitation fund,[16] the issue became somewhat muddled in a 4-1-4 decision of the United States Supreme Court in *Maryland Casualty Co. v.*

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[15] *Id.* at 495, 6 S. Ct. at 1157-58 (emphasis added).

[16] *Id.* at 504, 6 S. Ct. at 1163.

Cushing.[17] In that case, the tugboat Jane Smith, while attempting to pass under a bridge over the Atchafalaya River in Louisiana, collided with a concrete pier and capsized. The owner and the charterer of the Jane Smith filed consolidated petitions to limit their liabilities. Representatives of the five deceased seamen brought, in the same federal district court, actions against the owner of the bridge and the liability underwriters of the owner and charterer of the Jane Smith. They argued they had the right to bring a direct action against the underwriter in addition to and separate from the limitation proceeding. In other words, they wished to recover from the owner and charterer of the Jane Smith, in the limitation proceeding, the value of the Jane Smith at the end of her voyage plus freight pending, and from the underwriter directly the balance of their damages. These damages, they argued, should be limited only by the amount of the insurance policy.[18]

One can predict a response to this argument-limit the amount of insurance coverage to the amount of the insured's limitation fund and argue that the plaintiff could recover only one limitation fund. The district court granted a motion for summary judgment dismissing the suit against the underwriters on the rationale, inter alia, that allowing a direct action against the underwriters would "contravene the essential purpose expressed by the Act of Congress in a field already covered by [the

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[17] 347 U.S. 409, 74 S. Ct. 608, 1954 A.M.C. 837 (1954) [hereinafter *Jane Smith*].

[18] *Id.* at 409-11, 74 S. Ct. at 608-09, 1954 A.M.C. at 838-40.

Limitation] Act."[19] The Fifth Circuit reversed on the theory that the district court had read the Louisiana direct action statute too restrictively. The appellate court reasoned that the statute was nothing more than a permissible regulation of insurance and was not in conflict with any substantive admiralty law.[20]

In the United States Supreme Court, Mr. Justice Frankfurter, announcing the judgment of the Court and joined by Mr. Justice Reed, Mr. Justice Jackson, and Mr. Justice Burton, would have reversed the judgment of the Fifth Circuit and reinstated the district court opinion dismissing the direct action. They reasoned that the effect of the direct action would disturb the limitation proceeding. They viewed it as "a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law."[21]

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[19] Cushing v. Texas & Pac. Ry., 99 F. Supp. 681, 684, 1951 A.M.C. 1878, 1883 (E.D. La. 1951).

[20] Cushing v. Maryland Casualty Co., 198 F.2d 536, 538-39, 1952 A.M.C. 1803, 1806-08 (5th Cir. 1952).

[21] *Jane Smith*, 347 U.S. at 422, 74 S. Ct. at 615, 1954 A.M.C. at 847. The rationale expressed by these Justices reads as follows:

> Of course, liability underwriters are not entitled to "limitation of liability" as that phrase is used as a term of art in admiralty. To state the issue in these terms is to misconceive it. The question is whether the Court is to disregard the effect of a direct action on the federal proceedings. The Louisiana statute, as applied to authorize suits against the insurers of shipowners and charterers who have instituted limitation proceedings, is a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law. It is accentuated by the fact that the

Four Justices held the contrary view. Mr. Justice Black, Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Minton did not think insurance companies should be beneficiaries of the Limitation Act, which they considered a "shipowners' relief act."[22] They viewed the application of the direct action statute in that case as a remedy Louisiana had provided for wrongful death due to a maritime tort. Somewhat emotional arguments stated that "[a]t one time insurance companies were commonly able to avoid payment of a single dollar on their policies

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federal law involved is not a more or less ill defined area of maritime common law, incursion upon which need not be here considered, but an Act of Congress, well-defined and consciously designed, with detailed rules for its execution established by this Court.

"If the courts having the execution of [the Limitation Act] administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

Id. at 421-22, 74 S. Ct. at 615, 1954 A.M.C. at 847-48 (quoting Providence & N.Y.S.S. Co. v. Hill Mfg. Co., 109 U.S. 578, 588-89, 3 S. Ct. 379, 386 (1883)).

[22] *Id.* at 427, 74 S. Ct. at 620, 1954 A.M.C. at 851 (Black, J., dissenting).

whenever the insured was insolvent and therefore judgment-proof."[23] The Justices thought that "unless Congress has specifically forbidden states to protect seamen [through a direct action system], Louisiana's statute is valid and should be enforced."[24]

The 4-4 tie was broken by Mr. Justice Clark. His position was characterized by Mr. Justice Frankfurter as follows:

> [T]he direct action suits should not be permitted to impair the ship owner's and charterer's right to indemnification, but . . . the District Court [should be allowed] to adjudicate the liability of the [vessel owner] to the [plaintiffs] after the limitation proceeding has run its course.[25]

Mr. Justice Clark agreed with the holding in *City of Norwich* – that "the owner of the ship has the same right to protect his investment in the ship by insurance against damage claims . . . as he has to protect his investment from damage to the ship itself."[26] He did not consider this view to benefit the shipowner at the expense of the families of the deceased seamen. He realized that, had the owner not purchased liability insurance, the claimants could not have recovered under any condition more than

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[23] *Id.* at 431, 74 S. Ct. at 620, 1954 A.M.C. at 854 (Black, J., dissenting).

[24] *Id.* at 432, 74 S. Ct. at 620, 1954 A.M.C. at 855 (Black, J., dissenting).

[25] *Id.* at 422-23, 74 S. Ct. at 615, 1954 A.M.C. at 848.

[26] *Id.* at 424, 74 S. Ct. at 616, 1954 A.M.C. at 849 (Clark, J., concurring).

the value of the damaged vessel at the end of the voyage if the owner had no privity or knowledge of the cause of the collision.[27]

Jane Smith did allow a direct action against the underwriters, but required the limitation proceeding to be completed before the direct action could be heard. As was later learned, if the insurance policy were worded so that the insurance coverage would be exhausted by payment of the limitation amount, nothing would be left to be paid in the direct action. In this way, the direct action has allowed the underwriter, rather than the legislature, to determine the amount of compensation to be received by plaintiffs.

The development of the relationship between the Limitation Act and direct action statutes continued to take place predominantly in the Fifth Circuit. The late Judge John R. Brown, former Chief Judge of the Fifth Circuit, has had a very great effect on the relationship, if any, between the Limitation Act and Louisiana's direct action statute.

Ex parte Tokio Marine & Fire Insurance Co.[28] was decided some nine years after the Supreme Court's *Jane Smith* decision. *Tokio Marine & Fire Insurance Co.* came before the Fifth Circuit because of what Judge Brown euphemistically called the "rivalry"[29] between two district courts within the Fifth Circuit. The matter arose out of a collision on the Mississippi River between a tanker

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[27] *Id.* (Clark, J., concurring).

[28] 322 F.2d 113, 1964 A.M.C. 308 (5th Cir. 1963).

[29] *Id.* at 114, 1964 A.M.C. at 309.

and two adrift barges which had allegedly been inadequately secured by the owner of the servicing tug. The owner of the tug filed a petition for limitation of liability in the United States District Court for the Southern District of Texas. Subsequently, the tanker interests filed suit under Louisiana's direct action statute in the United States District Court for the Eastern District of Louisiana against the tug's underwriters. The tug's limitation proceeding in the Southern District of Texas precluded the tanker interests from filing suit against the tug or her owner, but did not preclude the tanker interests from filing suit against the tug's underwriters. The tanker interests petitioned the Fifth Circuit for writ of mandamus against the Texas judge before whom the tug's limitation of liability proceeding was pending. The petition asked that the judge be required to transfer the tug's limitation proceeding to the Eastern District of Louisiana where it could be consolidated with the tanker's proceeding against the tug's underwriters. The Fifth Circuit denied the petition.[30]

The tug next petitioned the Fifth Circuit for writ of mandamus or prohibition to prevent litigation from proceeding in the Eastern District of Louisiana. The Fifth Circuit took "a practical view."[31] Judge Brown reasoned that the denial of the petition to transfer the limitation proceeding from Texas to Louisiana meant the Texas proceeding should go forward. Judge Brown noted that the

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[30] *In re* Humble Oil & Refining Co., 306 F.2d 567, 1964 A.M.C. 321 (5th Cir. 1962).

[31] *Tokio Marine & Fire Ins. Co.*, 322 F.2d at 116, 1964 A.M.C. at 312.

Texas proceeding involved the same facts as the Louisiana suit.[32] Further noting that "the direct action insurer stands as a party-litigant in exactly the same shoes as the assured,"[33] Judge Brown stayed the Louisiana suit against the underwriters of the tug and her owners and operators until the limitation proceeding in Texas was concluded.[34] In doing so, however, Judge Brown did not decide whether the tug's underwriters were liable for plaintiff's damages that exceeded the limitation fund. Judge Brown wrote:

> We ought not to muddy up those waters by attempting to divine what the Supreme Court might now say it might have meant by its 4-1-4 decision [in *Jane Smith*] until such time as it becomes certain that the question is really presented.[35]

In *In re Independent Towing Co.*,[36] a limitation of liability proceeding, the district court held the Louisiana direct action statute deprived insurers of the insured's personal defenses. The court reasoned that limitation of liability was "personal" to shipowners and, therefore, was not available to their insurers.[37] It denied assertion of limitation of liability by the shipowner's liability insurer. Of course, the district court struggled with the concerns expressed in *Jane Smith* and *Tokio Marine & Fire Insurance*

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[32] *Id.*, 1964 A.M.C. at 313.

[33] *Id.*

[34] *Id.* at 117, 1964 A.M.C. at 314.

[35] *Id.* at 116, 1964 A.M.C. at 313.

[36] 242 F. Supp. 950, 1965 A.M.C. 818 (E.D. La. 1965).

[37] *Id.* at 954, 1965 A.M.C. at 824.

Co. While admitting that certain procedural problems could arise,[38] the court nevertheless forged ahead and denied insurers the benefit of limitation of liability.

The personal defense theory was subsequently endorsed in *Torres v. Interstate Fire & Casualty Co.*[39] In that case, the United States District Court for the District of Puerto Rico followed *Independent Towing Co.* It denied the insurer the opportunity to rely on limitation of liability, reasoning that Puerto Rico should give the same construction to its direct action statute[40] as Louisiana courts gave to Louisiana's statute because the Puerto Rico statute was modeled after Louisiana's.[41]

The personal defense theory then went before the Fifth Circuit and withstood the challenge of Judge Brown. The issue in *Olympic Towing Corp. v. Nebel Towing Co.*[42] was the very issue which had not been decided in *Tokio Marine & Fire Insurance Co.*

The underlying facts were simple. While attempting to avoid collision with Nebel's tug, Olympic's tug struck an underwater object and sank. Olympic brought suit against Nebel and, pursuant to the Louisiana direct

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[38] *Id.* at 956 n.13, 1965 A.M.C. at 827 n.13.

[39] 275 F. Supp. 784 (D.P.R. 1967).

[40] P.R. Laws Ann. tit. 26, §§ 2001-2004 (1977 & Supp. 1994).

[41] *Torres*, 275 F. Supp. at 789.

[42] 419 F.2d 230, 1969 A.M.C. 1571 (5th Cir. 1969), *cert. denied*, 397 U.S. 989, 90 S. Ct. 1120 (1970), *overruled by* Crown Zellerbach Corp. v. Ingram Indus., Inc., 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

action statute, Nebel's insurer. Nebel thereafter petitioned for limitation of liability under the Limitation Act. The district court held Nebel was entitled to limit its liability, but its insurer was not. It reasoned that the Limitation Act was a personal defense available only to the shipowner.[43]

On appeal, Nebel's insurer made numerous arguments,[44] all of which the Fifth Circuit rejected. First, the insurer argued Louisiana's direct action statute was in conflict with the Limitation Act and, therefore, should fall before paramount federal law. The Fifth Circuit referred to *Jane Smith* and noted that the United States Supreme Court had not invalidated Louisiana's direct action statute.[45]

Second, the insurer argued the shipowner would be deprived of the benefit of its insurance if funds were exhausted in direct action suits in other fora, especially state fora, before the conclusion of its limitation proceeding. The Fifth Circuit noted that the federal court sitting in admiralty had "ample injunctive power for the purpose of insuring the orderly and effective operation of the Limitation Act."[46]

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[43] *Id.* at 231-32, 1969 A.M.C. at 1572.

[44] Among the arguments were two technical arguments related to jurisdiction and concursus of claims in admiralty. These arguments, both dismissed, will not be addressed in this article.

[45] *Nebel Towing Co.*, 419 F.2d at 234, 1969 A.M.C. at 1575-76.

[46] *Id.*, 1969 A.M.C. at 1576-77.

Third, the insurer contended that denying insurers the benefit of limitation of liability would result in higher premiums to shipowners and would undermine the purpose of the Limitation Act. The Fifth Circuit rejected this argument noting, *inter alia*, that spreading losses through higher premiums would be perfectly compatible with the Limitation Act because the benefit of the full recovery is often retained within the maritime industry, and because the Limitation Act was intended to limit the amount of premiums paid by shipowners on insurance.[47]

Fourth, the insurer argued marine insurance was not subject to Louisiana's direct action statute. The Fifth Circuit dismissed this argument, noting it had already decided this issue.[48]

Fifth, the insurer argued the nature of a protection and indemnity policy did not permit a direct action. The argument was founded on the indemnity, or the pay-to-be-paid, nature of shipowners' protection and indemnity coverage. The Fifth Circuit rejected that argument, which the court said was contrary to the underlying public policy of Louisiana-liability insurance is issued primarily for the protection of the public rather than the insured.[49]

Finally, the insurer argued the right to limit liability is not a "personal defense" under Louisiana law and, therefore, should be available to the insurer. The Fifth Circuit explained that a "personal" defense attaches to the status because the law grants it to all members of a

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[47] *Id.*, 1969 A.M.C. at 1578.

[48] *Id.* at 236, 1969 A.M.C. at 1578-79.

[49] *Id.* at 237, 1969 A.M.C. at 1579-80.

chosen class as a matter of public policy. The court noted the Limitation Act "was in no way intended to benefit the insurance industry."[50]

After the Fifth Circuit rendered its decision, the appellants petitioned for rehearing. The petition was denied, but Judge Brown wrote a forceful dissenting opinion. Judge Brown argued the Louisiana direct action statute had been misconstrued. He argued the statute was not intended to create a new liability against the insurer, but "was intended merely to afford a direct, non-circuitous means of satisfaction of a claim judicially determined to be owing by the assured and which is within the limits and terms of the coverage afforded by the insurance policy."[51] His view, Judge Brown argued, was founded and supported by the very language of Louisiana Revised Statutes 22:655, which at that time provided in part:

> It is also the intent of this section that all liability policies within their terms and limits are executed for the benefit of all injured persons . . . and that it is the purpose of all liability policies to give protection and coverage to all insureds . . . for any legal liability said insured may have as or for a tort-feasor within the terms and limits of said policy.

Judge Brown further opined that treating the shipowner's right to limit his liability as a personal defense

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[50] *Id.* at 238, 1969 A.M.C. at 1580-82.

[51] *Id.* at 240 (Brown, C.J., dissenting from a denial of rehearing).

under Louisiana law was "completely wrong."[52] He argued the right to limit liability was not one which inheres in the "person" of the shipowner and distinguished it from other personal defenses. He argued limitation was available not to all shipowners under any circumstances but "to a shipowner of a specific vessel under some circumstances."[53] Judge Brown's major concern was the effect the Louisiana treatment of limitation of liability would have on the uniformity of the admiralty principles.

Nebel Towing Co. came two years after a Fifth Circuit panel, which included Judge Brown, decided *Alcoa Steamship Co. v. Charles Ferran & Co.*[54] Perhaps Judge Brown, convinced *Alcoa Steamship Co.* represented the correct direction in which the law should move to preserve uniformity in admiralty, feared *Nebel Towing Co.* would play havoc.

Alcoa Steamship Co. discussed a ship repair contract and the contractor's liability insurance. The S.S. Alcoa Corsair underwent repair in New Orleans provided by C. Ferran & Co. Ferran carried liability insurance, limited to $300,000; that limit was a term of the repair contract. The shipowner brought suit against the repair contractor on a

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[52] *Id.* at 243 (Brown, C.J., dissenting from a denial of rehearing).

[53] *Id.* (Brown, C.J., dissenting from a denial of rehearing).

[54] 383 F.2d 46, 1967 A.M.C. 2578 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111 (1968). The district court decision affirmed by the Fifth Circuit is located at Alcoa S.S Co. v. Charles Ferran & Co., 251 F. Supp. 823, 1966 A.M.C. 1029 (E.D. La. 1966).

negligence theory and, under Louisiana's direct action statute, against the contractor's liability insurance carrier for damages in excess of the $300,000 policy limit.[55]

The Fifth Circuit affirmed the district court's holding that the contractor and its insurer were liable, but limited their liability to the $300,000 policy limit. While acknowledging that a "personal defense" would not have been available to the insurer, the Fifth Circuit explained that a "limitation of liability agreed to by parties in relatively equal bargaining positions does not fall into that category [of personal defenses]."[56]

Following *Alcoa Steamship Co.*, Judge Brown may have thought courts would stay the course and preserve uniformity in admiralty. Thus, the majority opinion in *Nebel Towing Co.* was, to Judge Brown, "completely wrong." The opportunity to correct the "wrong" came in 1984, fifteen years after *Nebel Towing Co. Crown Zellerbach Corp. v. Ingram Industries, Inc.*,[57] was argued before a panel of three Fifth Circuit judges including Judge Brown. The case concerned a collision by a tug-barge against a water intake structure on the Mississippi River above Baton Rouge, Louisiana, in heavy fog and rain. Suit was filed by the owner of the water intake structure against the tug owner and its protection and indemnity (P & I) insurers. The tug owner relied on the Limitation Act,

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[55] *Alcoa S.S. Co.*, 383 F.2d at 48-49, 1967 A.M.C. at 2579-80.

[56] *Id.* at 56, 1967 A.M.C. at 2592.

[57] 745 F.2d 995, 1986 A.M.C. 305 (5th Cir. 1984) [hereinafter *Crown Zellerbach Corp. I*], *vacated en banc*, 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

and the P & I insurers relied on their policy limit. The district court limited the tug owner's liability, but held the P & I insurers liable for nearly $2 million in excess of the tug owner's limitation, despite the terms of the P & I insurance contract which limited the dollar amount of the coverage to the amount to which the insured could limit his liability.[58]

"Unable to find any valid distinction,"[59] the majority of the panel felt compelled to follow *Nebel Towing Co.* The majority said the insurer could not, under *Nebel Towing Co.*, reduce its liability solely on the basis of the shipowner's statutory right to limit his liability. It viewed the insurer's argument as merely an "indirect" attempt to bring about the same result the *Nebel Towing Co.* court had expressly denied. The majority affirmed the district court's decision; the insurers had to pay more than $2 million over and above the fixed liability under the insurance policy.

Judge Brown dissented. He argued in his thorough dissent that "there must be a legal liability on part of the assured for the insurer to have a direct action liability."[60] He reasoned that a provision of the policy which limited the insurer's liability was a separate issue to be distinguished from the statutory right *Nebel Towing Co.*

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[58] *Id.* at 997, 1985 A.M.C. at 306-07.

[59] *Id.* at 998, 1985 A.M.C. at 309.

[60] *Id.* at 1000, 1985 A.M.C. at 313 (Brown, C.J., dissenting in part).

addressed; a policy defense, as opposed to a statutory defense, could not be a personal defense.[61]

An application for rehearing en banc was made and the Fifth Circuit granted the request. In the en banc hearing,[62] the Fifth Circuit not only reversed the district court's decision, but also overruled *Nebel Towing Co.* Judge Brown wrote for the court and adopted, in large part, his dissenting opinion from *Crown Zellerbach Corp. I.*

Judge Brown first reviewed the *Nebel Towing Co.* decision. He agreed the term of the P&I insurance policy which limited coverage to the sums the insured had paid ran afoul of the Louisiana direct action statute.[63] But he disagreed with *Nebel Towing Co.*'s dictum that indicated limitation of liability was a defense personal to the shipowner and not available to the insurer.[64]

Judge Brown made a simple and clear distinction between the underwriter's argument in *Nebel Towing Co.* and the underwriter's argument in the case before the court. In *Nebel Towing Co.*, the underwriter claimed it had a right to the *statutory limitation*. Here, the underwriter

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[61] *Id.* at 1002-05, 1985 A.M.C. at 319-21 (Brown, C.J., dissenting in part).

[62] Crown Zellerbach Corp. v. Ingram Indus., Inc., 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.) (en banc) [hereinafter *Crown Zellerbach Corp. II*], *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

[63] The policy limited the insurer's liability to "such sums as the assured . . . shall have become legally liable to pay and shall have paid on account." *Id.* at 1299, 1986 A.M.C. at 1476.

[64] *Id.*

relied on the terms of its insurance coverage which happened to limit that coverage to the amount to which the insured could limit his liability.

This observation caused the majority in *Crown Zellerbach Corp. II* to frame the issue as follows:

> Since there can be no question that Rule 8(i) is one of the " . . . lawful conditions of the policy or contract," it brings us face to face with the critical provision of the Louisiana Direct Action Statute that "any action brought hereunder shall be subject to . . . *the defenses which could be urged by the insurer to a direct action brought by the insured. . . .* "[65]

Judge Brown explained that the policy limit at issue in *Crown Zellerbach Corp. II* could not be contrary to Louisiana law or to the public policy of the state. The supporting precedent was set forth in two Louisiana Supreme Court decisions.[66] The result reached in *Nebel Towing Co.* could not, however, stand in the face of that precedent:

> The [direct action] statute does not purport to interfere with the right of an insurance company to limit the so-called coverage, "in any policy against liability," to "liability imposed upon him [the assured] by law," as this policy provides. An insurance company therefore, may – as the

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[65] *Id.* at 1300, 1986 A.M.C. at 1478 (quoting the Louisiana Direct Action Statute, La. R.S. 22:655 (1977 & Supp. 1994)).

[66] Burke v. Massachusetts Bonding & Ins. Co., 209 La. 495, 24 So. 2d 875 (1946); Ruiz v. Clancy, 182 La. 935, 162 So. 734 (1935).

> company did in this instance – limit the coverage, or liability of the company, to pay only such sums as the insured shall become obligated to pay by reason of the liability imposed upon him by law.[67]

Judge Brown also saw no violation of public policy in the "wholesome economic principle" that the underwriters pay up to, but not beyond, the assured's legal liability. As Judge Brown put it, "Whatever the assured is liable for, [the insurer] will pay, 100% in full with no discount, but no more."[68]

Judge Brown also confronted Nebel Towing Co.'s personal defense theory. He referred to the *Alcoa Steamship Co.* district court's detailed analysis, and presumed the *Nebel Towing Co.* court must have been persuaded by that analysis. The district judge in *Alcoa Steamship Co.* had concluded that a defense was personal if the law granted it, as a matter of public policy, to all members of a class. The district judge in *Alcoa Steamship Co.* also reasoned that limitation of liability must be "personal" because it was granted to all shipowners.[69] The *Nebel Towing Co.* court had adopted that analysis in its entirety.[70]

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[67] Crown Zellerbach Corp. v. Ingram Indus., Inc., 783 F.2d 1296, 1301, 1986 A.M.C. 1471, 1479-80 (5th Cir.) (quoting Ruiz v. Clancy, 182 La. 935, 941, 162 So. 734, 735 (1935)) (alteration in original), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

[68] *Id.* at 1302, 1986 A.M.C. at 1480.

[69] Alcoa S.S. Co. v. Charles Ferran & Co., 251 F. Supp. 823, 830-31, 1966 A.M.C. 1029, 1058-60 (E.D. La. 1966), aff'd, 383 F.2d 46, 1967 A.M.C. 2578 (5th Cir. 1967), *cert. denied*, 393 U.S. 836, 89 S. Ct. 111 (1968).

[70] Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230, 237-38, 1969 A.M.C. 1571, 1581-82 (5th Cir. 1969), *cert. denied*,

Judge Brown explained that some, but not all shipowners were allowed to limit. If the defense were personal, each member of an "identified" class would be allowed the defense. This distinction compelled the conclusion that limitation of liability was not a defense personal to the shipowner.[71] Indeed, if anything were personal in character, Judge Brown wrote, the policy defense would be personal to the underwriters.[72]

To be sure, there was a dissenting opinion, which asserted that insurance policies had been sold and their rates determined on the basis of *Nebel Towing Co.* While urging adherence to the *Nebel Towing Co.* holding that limitation of liability is a personal defense,[73] the dissenting opinion failed to explain why courts should continue to do so.

Since *Crown Zellerbach Corp. II*, two cases involving the Louisiana direct action statute and the Limitation Act have gone before the Fifth Circuit. One of the two, *Brister v. A.W.I., Inc.*,[74] was no more than an affirmation of *Crown Zellerbach Corp. II.* The *Brister* court observed, as one might anticipate, that the inclusion of so-called "Crown

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397 U.S. 989, 90 S. Ct. 1120 (1970), *overruled by* Crown Zellerbach Corp. v. Ingram Indus., Inc., 783 F.2d 1296, 1986 A.M.C. 1471 (5th Cir.), *cert. denied*, 479 U.S. 821, 107 S. Ct. 87 (1986).

[71] *Crown Zellerbach Corp. II*, 783 F.2d at 1303, 1986 A.M.C. at 1482.

[72] *Id.*

[73] *Id.* at 1305-06, 1986 A.M.C. at 1485-86 (Tate, J., dissenting). Judge Tate was joined by Judges Rubin, Politz, Johnson, and Williams.

[74] 946 F.2d 350 (5th Cir. 1991).

Zellerbach" clauses had become routine in marine insurance policies.[75]

Most recently, *In re Magnolia Marine Transport Co.*[76] was before the Fifth Circuit. The underlying facts in *Magnolia Marine Transport Co.* were simple: The master of one of two ships involved in a collision on the Mississippi River drowned as a result of the collision. Procedurally, however, *Magnolia Marine Transport Co.* was anything but simple. The widow of the drowned master sued her late husband's employer and Mississippi Marine, the owner of the vessel her late husband had commanded, in state court. She later joined Magnolia Marine, the owner of the other colliding vessel, and Magnolia's marine insurance underwriters. Magnolia petitioned to limit its liability in the federal district court, and the limitation proceeding stayed the state court action. The widow argued Magnolia's insurance contract, as worded, might not allow the insurers to limit their liability. Persuaded by the argument, the district court stayed the limitation proceeding to allow the state court to interpret the policy language. Magnolia and its underwriters urged the federal court that it, rather than the state court, should interpret the policy. They sought a declaratory judgment, and the declaratory judgment suit in the federal district court was consolidated with the limitation proceeding. Following the consolidation, the widow moved to dismiss the

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[75] *Id.* at 359.

[76] 964 F.2d 1571 (5th Cir. 1992). *Magnolia Marine Transp. Co.* reversed Magnolia Marine Transp. Co. v. Frye, 755 F. Supp. 149, 1991 A.M.C. 1190 (E.D. La. 1991).

declaratory judgment suit.[77] The district court, relying on *Crown Zellerbach Corp. II*, determined it should interpret the insurance policy because interpretation of insurance policy language was "more properly a function of the limitation proceeding."[78] The widow appealed.

Among the issues before the Fifth Circuit was whether the Limitation Act afforded the underwriters of a shipowner a right of limitation. The court found no such statutory basis.[79] The court further found that a liability-term in a marine insurance policy did not give the underwriters standing under the Limitation Act to assert limitation defensively.[80] While noting that admiralty jurisdiction encompasses issues arising from marine insurance contracts, the court held federal courts had concurrent, not exclusive, jurisdiction over such matters with state courts. The Fifth Circuit held interpretation of Louisiana marine insurance contracts was a task for Louisiana's state courts.[81] *Magnolia Marine Transport Co.* read *Crown Zellerbach Corp. II* restrictively and determined the insurer's right to limit its liability depends upon the terms of its contract of insurance.[82]

Since the Supreme Court's *Jane Smith* decision, the relationship between limitation of liability and the direct

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[77] *Magnolia Marine Transp. Co.*, 755 F. Supp. at 151, 1991 A.M.C. at 1191-92.

[78] *Id.*, 1991 A.M.C. at 1193.

[79] *Magnolia Marine Transp. Co.*, 964 F.2d at 1576.

[80] *Id.*

[81] *Id.* at 1576-77.

[82] *Id.* at 1576-77.

action statute has continued to evolve. Without guidance from Congress or Louisiana's legislature, however, courts have had to devise solutions of their own.

The amount of compensation due injured parties in limitation situations seems to have been left in the hands of the insurer. If the P&I insurer relies only on the statutory right of its insured to limit, the injured parties will probably have an unlimited amount of insurance available to them. If, on the other hand, the P&I insurer limits the amount of its coverage to coincide with the dollar value of its insured's limitation, the injured parties will only have that limited fund to pay for their injuries.

This semantic resolution of the problem does not seem satisfactory. If the Limitation Act causes a problem, it should be fixed rather than circumvented. David Steel, Q.C., pointed to faults of the United States Limitation Act in a paper he presented on September 27, 1994, in Cambridge, England.[83] Mr. Steel observed that "the greater the maritime catastrophe, the smaller the fund under current U.S. law."[84] Thus, the greater the injuries, the less each victim will be compensated.

It is obvious many judges simply do not like the Limitation Act and are willing to use avenues such as direct action statutes to circumvent it. This situation leaves neither the injured parties nor the shipowners with

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[83] David Steel, Q.C., Ships Are Different: The Case for Limitation of Liability, The David Underwood Memorial Lecture (Sept. 27, 1994). The lecture was organized by the Cambridge Academy of Transport and sponsored by the Swedish Club.

[84] *Id.* at 2.

the predictability they deserve. Trying a limitation action in the United States is quite a gamble. The shipowners bear the burden of proving the cause of the catastrophe and the lack of the owner's privity and knowledge of that cause. If successful, a shipowner is liable only for the value of his ship at the end of the casualty voyage plus the freight earned on that voyage and an additional fund for personal injury and wrongful deaths of $420 for each gross registered ton. If a ship were lost, the value of the ship would, of course, be zero. If the shipowner were not able to limit, he and his underwriter would be liable without limitation.

The United States Congress would be well advised to change the Limitation Act to take advantage of the finite but sizeable insurance available to pay injured parties.[85] On one hand, the United States should encourage investment in shipping and the availability of insurance by limiting a shipowner's liability to an amount he can insure for a reasonable cost. On the other hand, a reasonable amount should be available to pay injured parties. Both considerations could be met through a more certain limitation based on the tonnage of the ship plus, perhaps, an additional fund for each person injured or killed by the vessel.

Ratification and possible amendment of the 1976 Limitation Conference[86] could accomplish this purpose.

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[85] One needs only to look at the problems created by the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (Supp. V 1993), to realize insurance is finite.

[86] *See* Official Records of the Int'l Conference on Limitation of Liability for Maritime Claims, London, November 19, 1976.

The shipowner, her charterer, and others may limit their liabilities pursuant to the 1976 Limitation Conference unless the claimants bear the burden to show that the persons attempting to limit intentionally caused the catastrophe or that they acted recklessly with actual, subjective knowledge that the recklessness would probably cause damage. This limitation fund is based on the tonnage of the vessel, which does not decrease with the severity of the catastrophe.

The United States should work with the international maritime community to establish a satisfactory limit and should ratify whatever result is reached by these efforts.

Supreme Court, U.S.
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No. 97-61

In The

Supreme Court of the United States

October Term, 1996

MARGARET HEBERT JACKSON, DIANE ARTHUR, CONSOLIDATED WITH BARBARA ARTHUR, MARY KING HILL, ET AL.,

Petitioners,

versus

ZAPATA HAYNIE CORPORATION, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeal For The State Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

Respondents are the insurers of Zapata Haynie Corp., namely, David Gareth Williams, as nominee and representative of Certain Underwriters at Lloyd's, London, and English & American Insurance Company, Limited, Phoenix Assurance Company, Limited, Indemnity Marine Assurance Company, Limited, Commercial Union Assurance Company, Limited, Prudential Assurance Company, Limited Trust II, Northern Star Insurance Company, Limited, Scottish Lion Insurance Company, Limited, Insurance Company of North America (U.K.), Limited, Yorkshire Insurance Company, Limited, Sovereign Insurance Company Limited, Orion Insurance Company PLC, London & Hull Maritime Insurance Company, Limited, The Ocean Marine Insurance Company, Ltd., Cornhill Insurance Company PLC, Minster Insurance Company, Limited, Bishopsgate Insurance Company, Limited, Forsikringsaktieselskapet, Vesta Norway and Abu Dhabi National Insurance Company

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IV.

STATEMENT OF THE CASE

On October 3, 1989, the F/V NORTHUMBERLAND, a fishing vessel owned by Zapata Haynie Corporation, ("Zapata Haynie") was located off the coast of Texas when it struck a partially submerged natural gas pipeline owned by National Gas Pipeline Company of America ("NGP"). An explosion occurred which resulted in the deaths of eleven of the fourteen crewmembers aboard the vessel. Petitioners Diane Arthur, Margaret Hebert Jackson and Mary King-Hill are the survivors of three of the crewmembers who were killed.

As a result of that casualty, Zapata Haynie invoked the provisions of the Limitation of Liability Act, 46 U.S.C. § 181-189, and filed a Complaint in the United States District Court for the Western District of Louisiana, seeking exoneration from and/or limitation of liability. Pursuant to the procedures set forth in Rule F of the Federal Rules of Civil Procedure, Supplemental Rules for Certain Admiralty and Maritime Claims, the U.S. District Court stayed all other court proceedings and ordered all persons asserting a claim in connection with the October 3, 1989 casualty to file their claims in the limitation proceeding. In response, petitioners, along with NGP and numerous other parties, filed claims and contested Zapata Haynie Corp.'s right to exoneration from and/or limitation of liability.

After commencement of the limitation of liability action, petitioners filed suits in the 38th Judicial District Court for the Parish of Cameron, Louisiana, against Zapata Haynie Corp., asserting damages under the Jones

Act, 46 U.S.C. § 688, and requesting a trial by jury. Subsequently, plaintiffs-petitioners amended their petitions by First Supplemental and Amended Petitions to assert direct actions against Zapata Haynie's insurers, pursuant to the Louisiana Direct Action Statute, La. Rev. Stat. Ann. § 22:655. The state court proceedings were stayed pursuant to the U.S. District Court's previous order, dated October 6, 1989, which stayed all such suits until the rendering of decision in the limitation of liability action.

A trial on the limitation of liability action began on March 18, 1991, in U.S. District Court for the Western District of Louisiana, with Judge Donald E. Walter presiding. Judgment was rendered on April 25, 1991, with the district court finding that NGP was 100% at fault for the casualty and that Zapata Haynie was not at fault.[1] Accordingly, Zapata Haynie was exonerated from liability. The district court's decision was affirmed on appeal to the U.S. Fifth Circuit Court of Appeals. *Zapata Haynie Corp. v. Arthur*, 980 F.2d 287 (5th Cir. 1992). This Court denied the petition for writ of certiorari, ___ U.S. ___, 113 S. Ct. 2999, 125 L. Ed. 2d 692 (1993).

In light of the ruling in the limitation of liability suit, which exonerated Zapata Haynie from liability, petitioners conceded that no further claim could be pursued against Zapata Haynie. However, petitioners sought to maintain their direct action claims in state court against Zapata Haynie's insurers. Zapata Haynie's insurers, the respondents herein, filed an Exception of No Cause of

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[1] Prior to the limitation trial, petitioners had settled separately with NGP.

Action in the state court proceeding. Respondents asserted that the petitioners' claims against them, as Zapata Haynie's insurers, were barred by principles of *res judicata,* inasmuch as the federal court had exonerated Zapata Haynie from liability. Judge H. Ward Fontenot of the 38th Judicial District Court for the Parish of Cameron, Louisiana granted respondents' Exception and dismissed the direct action claims.

Petitioners filed an appeal to the Louisiana Third Circuit Court of Appeal. The Louisiana Court of Appeal affirmed, finding that *res judicata* barred petitioners from proceeding against Zapata Haynie's insurers pursuant to the Louisiana Direct Action Statute, as that would result in relitigating the issue of Zapata Haynie's liability. A Petition for Rehearing to the Louisiana Third Circuit Court of Appeal was denied. Petitioners filed an Application for Writs of Certiorari and Review to the Louisiana Supreme Court. On May 30, 1997, the Louisiana Supreme Court denied Petitioners' Application for Writs of Certiorari and/or Review.

V.

SUMMARY OF ARGUMENT

Petitioners fail to show that any of this Court's considerations for granting a writ of certiorari are present.

The decision of the Louisiana Third Circuit Court of Appeal was that, under principles of *res judicata,* a direct action claim against insurers is barred where the assured is found without fault. That decision does not conflict with decisions of either this Court or of any of the U.S. appellate courts. Although petitioners assert that the

Louisiana appellate court's decision is in conflict with this Court's decision in *Maryland Casualty Co. v. Cushing*, 347 U.S. 409 (1954), there is no conflict. In the *Maryland Casualty Co.* case, this Court held that the Louisiana Direct Action Statute should not disturb the uniformity of maritime law. According to the 4-1-4 decision in *Maryland Casualty*, a direct action claim may be asserted, but not until after the limitation proceeding has run its course. There was nothing in the Louisiana Third Circuit Court of Appeal's opinion which is in conflict with that holding.

Nor is there any undecided important question of federal law. Even petitioners are unable to suggest any unresolved issue of law that this Court must consider. What petitioners argue is simply that the Louisiana Third Circuit Court of Appeal misapplied the principles of *res judicata*. Acknowledging that the Louisiana Third Circuit Court of Appeal correctly stated the federal *res judicata* rule, petitioners argue that there was a misapplication of this properly stated rule of law. That is not sufficient grounds for this Court granting a writ of certiorari.

VI.

ARGUMENT

1. THE LOUISIANA COURT OF APPEAL'S OPINION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR ANY U.S. COURT OF APPEALS

Petitioners suggest that the Louisiana Third Circuit Court of Appeal's decision is somehow contrary to this Court's decision of *Maryland Casualty Company v. Cushing, supra,* and the Fifth Circuit's decision of *Olympic Towing Corp. v. Nebel Towing Company, Inc.*, 419 F.2d 230 (5th Cir.

1969), *cert. denied*, 397 U.S. 989 (1970). Petitioners fail to explain how the Louisiana Third Circuit Court of Appeal's decision is in conflict with either decision. A review of those cases shows that there is indeed no conflict.

This Court's decision in the *Maryland Casualty Co. v. Cushing* case was a 4-1-4 decision. Four of the Justices would have dismissed direct action claims as contrary to federal maritime law. However, in order to reach a majority, the four Justices joined with concurring Justice Clark and held that the direct action suit should not be allowed to impair the shipowner's right to indemnification and that any direct action would have to be heard after the completion of the limitation proceeding. As the Court noted, one of the purposes of the limitation statute was to draw into one court all of the claims so that they might be heard by one judge, on one state of facts, in one trial, and intelligently disposed of. *Id.* at 415. The rights of the shipowner under the Act should be declared and settled by a definitive decree of a competent court, which should be binding on all parties interested. *Id.* That is exactly the procedure followed in the present case.

The Louisiana Court of Appeal's opinion in the present case is not contrary to, and in fact is consistent with, this Court's opinion in the *Maryland Casualty Co. v. Cushing* case. Nowhere does the *Maryland Casualty Co.* case state, as contended by petitioners, that "the Louisiana Direct Action Statute controlled and the public policies therein provided the correct measure of recovery against the insurer of a vessel involved in a maritime accident regardless of any type of limitation of liability afforded the owner (charterer) by the Limitation of Liability

Act . . . " (Petition for a Writ of Certiorari, p. 10). On the contrary, as was held in the *Maryland Casualty Co.* case, the reverse is true, and the direct action statute may not impair the shipowner's rights under the Limitation Act.

The *Maryland Casualty Co.* decision resolved how the Limitation Act can be administered to avoid conflict between the Limitation Act and the Louisiana Direct Action Statute. The procedure is to first conclude the limitation proceeding, after which the direct action could be determined. That is exactly what occurred in this case. The limitation proceeding was first held in the U.S. District Court. The direct actions against Zapata Haynie's insurers were then heard in the state district court. However, the state district court dismissed the direct action claims under principles of *res judicata.*

Under Louisiana law the insurers and the assured share the same identity for purposes of *res judicata. Hannie v. Wall,* 569 So.2d 1044 (La. App. 3 Cir. 1990), *writ denied,* 573 So.2d 1116 (La. 1991). As established by Louisiana courts, there must be legal liability on the part of the assured for the insurer to have a direct action liability. *Foster v. Hampton,* 352 So.2d 197 (La. 1977), *reh'g denied,* 381 So.2d 781 (La. 1980). The Louisiana district court thus dismissed the direct action claims on the basis of this Louisiana law, not on the basis of any federal law, and clearly not contrary to any decision by this Court.

The second case which petitioners suggest is in conflict with the state appellate court's decision is that of *Olympic Towing Corp. v. Nebel Towing Co., supra.* In the *Olympic Towing* case, the issue was whether the shipowner's right to limit its liability was a defense personal

to the shipowner and thus not available to the insurer. However, the *Olympic Towing* case was definitively overruled in a subsequent *en banc* decision by the U.S. Fifth Circuit. In *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296 (5th Cir. 1986), *cert denied*, 479 U.S. 821 (1987), the *en banc* court of the U.S. Fifth Circuit Court of Appeals revisited the question and specifically overruled *Olympic Towing Corp. v. Nebel Towing Co.* Describing the issues, Judge John Brown for the Fifth Circuit explained that, "Along the way we will determine the continued vitality of our earlier *Nebel Towing* decision on which the trial court and the panel majority relied." *Id.* at 1297. In conclusion, the *en banc* court of the Fifth Circuit ruled that, "*Nebel Towing* is overruled." *Id.* at 1304. In overruling the *Nebel Towing* case, the *Crown Zellerbach* court held that the limitation of liability defense is not personal to the shipowner. As the *Crown Zellerbach* court explained, limitation of liability is not an immunity nor an assured defense. But rather, the Limitation of Liability Act grants certain federal rights to vessel owners under certain circumstances as a matter of public policy. Thus, the underwriters' liability was fixed to that of the assured shipowner's judicially declared limitation of liability.

The present case does not even involve the question of whether insurers are entitled to benefit from the shipowner's limitation of liability. The U.S. district court did not reach the issue of whether Zapata Haynie could limit its liability to the value of the vessel because Zapata Haynie was found without fault, and thus exonerated. The only issue is whether the judgment exonerating Zapata Haynie bars a subsequent direct action against Zapata Haynie's insurers based on the same set of facts.

The state court correctly dismissed the direct action claims based upon principles of *res judicata*. As the Louisiana court of appeal held, if there can be no further claim against Zapata Haynie, there can be no further claim against Zapata Haynie's underwriters. The Louisiana Direct Action Statute does not give a plaintiff some independent cause of action. As is well established in Louisiana law, an insurer stands in the shoes of the insured and the defenses available to the insured are also available to the insurer. *Smith v. Kelly Labor Service*, 239 So.2d 685 (La. App. 4 Cir. 1970), *writ refused*, 241 So.2d 531 (La. 1970).

There is nothing in either the *Maryland Casualty Co.* or *Crown Zellerbach* case which is inconsistent with the ruling by the Louisiana appellate court in the present case. On the contrary, the Fifth Circuit's *Crown Zellerbach* decision supports the Louisiana court of appeal's decision in the present case. As the Fifth Circuit stated in the *Crown Zellerbach* case, the Louisiana Direct Action Statute allows a direct action against the liability insurer for Louisiana incurred damages:

> But the statute does not create new Louisiana liabilities. On the contrary, by its own terms, reinforced by Louisiana judicial decisions, the statute imposes liability on the insurer subject "to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this State."

Id. at 1299.

Further, the Fifth Circuit acknowledged in the *Crown Zellerbach* case the well established rule which is controlling in this case. The Louisiana Direct Action Statute does not create any cause of action in and of itself; the Direct Action Statute merely provides the procedure for suing underwriters when there is legal liability of the assured.

> The decisions of the Louisiana courts have been as unambiguous as the language of the Direct Action Statute itself: there must be a legal liability on the part of the assured for the insurer to have a direct action liability.

Id. at 1301.

Because the Louisiana courts dismissed the direct action claim on grounds of *res judicata,* there is no need to determine whether the respondents' policy issued to Zapata Haynie has a "*Crown Zellerbach* clause," i.e., a provision in the policy fixing the underwriters' maximum liability to that of the assured shipowner's judicially declared limitation of liability. However, it must be pointed out that there is a misstatement in the Petition for Writ of Certiorari, wherein petitioners erroneously stated that respondents' policy issued to Zapata Haynie Corporation "has no *Crown Zellerbach* clause" (Petition for a Writ of Certiorari, p. 11)

Because the issue was moot, the Louisiana courts did not reach the question of whether respondents' policy contained language limiting underwriters' liability to that of the assured shipowner's judicially declared limitation of liability. Nevertheless, that was an alternative argument in respondents' brief before the Louisiana Third Circuit Court of Appeal. As submitted by respondents to

the Louisiana Third Circuit Court of Appeal, the Louisiana courts have held that there is no standard language required for a *Crown Zellerbach* clause. *Rogers v. Texaco, Inc.*, 638 So.2d 347 (La. App. 4 Cir. 1994). Respondents' policy did contain language limiting underwriters' liability to that liability imposed upon the assured by law. Thus, even though the Louisiana courts did not reach the issue, it is submitted that had the courts reached that issue, they would have found that respondents' policy has language fixing underwriters' maximum liability to that of the assured's judicially declared limitation of liability.

In this case there was no liability found on the part of the assured, Zapata Haynie. Under principles of *res judicata*, and according to the terms of the contract of insurance, there can be no liability of the insurers. No U.S. Supreme Court or U.S. appellate court decision is to the contrary.

2. THERE IS NO UNDECIDED IMPORTANT QUESTION OF FEDERAL LAW

In their Petition for a Writ of Certiorari, petitioners do not even argue that there is an undecided federal law. Indeed there is not. The question presented by petitioners is whether the Louisiana Third Circuit Court of Appeal properly applied federal *res judicata* procedural rules. In other words, petitioners simply allege that the Louisiana courts misapplied the federal *res judicata* rule. That is not grounds for this Court granting a writ of certiorari.

In any event, the Louisiana Third Circuit Court of Appeal correctly applied the *res judicata* rule. Louisiana

courts have held that when a state court is required to determine the conclusive effect of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of *res judicata* that must be applied. *Tye v. Co-Mar Offshore Operators, Inc.*, 669 So.2d 438 (La. App. 1 Cir. 1995), *writ denied*, 674 So.2d 975 (La. 1996). Under the federal doctrine of *res judicata*, four requirements must be met: 1.) the parties must be identical in the two actions; 2.) the prior judgment must be rendered by a court of competent jurisdiction; 3.) there must be a final judgment on the merits; and 4.) the same cause of action must be involved in both cases. *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992); *In Re Howe v. Vaughn*, 913 F.2d 1138 (5th Cir. 1990).

Petitioners concede that the second and third criteria of the *res judicata* test are met. It is the first and fourth criteria that petitioners contend have not been met. In addressing the first criterion, petitioners argue that Zapata Haynie and its insurers lack an identity of parties because they were not both parties to the limitation proceeding. However, federal courts have held that there is an "identity of parties" even though a party was not named in the original litigation. The identity of the parties test is met when the parties' interests are closely aligned and are adequately represented by the party in the prior action. Where the claims against one are derivative of the claims against the other, there is an identity of parties sufficient to apply the principles of *res judicata*. *Eubanks v. F.D.I.C., supra.*

In addressing the specific relationship involved in this case, Louisiana courts have held that an insurer and its insured are the same parties in the legal sense of the word. *Hannie v. Wall, supra; Funai v. Air Center, Inc.*, 499

So.2d 669 (La. App. 3 Cir. 1986). As stated by the Louisiana appellate court in the *Hannie v. Wall* case, *supra,* at 1050, "For *res judicata* purposes, the insured and the insurer not only share the same qualities as parties but in essence their identities are virtually merged into one, to the extent of the policy limits."

Accordingly, there is no unsettled law as to whether the insured and insurer are the same parties for purposes of *res judicata.* The issue has been considered on several occasions and, without contradiction, it has been held that the insurer and the insured are considered the same parties for purposes of *res judicata.*

Likewise, there is no unsettled law as to when causes of action are the same for *res judicata* purposes. The federal courts have adopted the transactional test of the Restatement (Second) of Judgments to determine whether two suits involve the same claim. Where the second cause of action is based on substantially the same facts as the first claim, *res judicata* bars the second claim. *Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Serv., Inc.,* 799 F.2d 213 (5th Cir. 1986). Under the test established by the federal courts for *res judicata,* the critical issue is not the relief requested or the theory asserted, but whether the plaintiff bases the two actions on the same "nucleus of operative facts." The rule is that *res judicata* bars all claims that were or could have been advanced in support of the cause of action on the occasion of its former adjudication, not merely those that were adjudicated. *In Re Howe v. Vaughn, supra,* at 1144. The Louisiana appellate court thus correctly stated the federal rule of *res judicata* and properly applied it to the facts in this case.

What petitioners argue is that because they had Jones Act claims, they should have been allowed, by virtue of the Louisiana direct action statute, to try their Jones Act claims in state court before a jury. There is no unsettled federal law on this issue. The federal law is settled that the shipowner's right to limit liability and litigate the issue of exoneration and limitation in federal court must be protected. As the U.S. Fifth Circuit Court of Appeals explained in *Texaco, Inc. v. Williams*, 47 F.3d 765, 767 (5th Cir. 1995), *cert denied*, ___ U.S. ___, 116 S. Ct. 275, 133 L. Ed. 2d 196 (1995), there is "a recurring and inherent conflict" between the exclusive jurisdiction vested in admiralty courts by the Limitation of Liability Act and the common law remedies provided in the Savings to Suitors Clause of 28 U.S.C. § 1333.

> The problem is that "one statute [gives the complainant] the right to a common-law remedy, which he [may seek] in the state court; and another statute [gives the shipowner] the right to seek a limitation of liability in the federal district court." [quoting from *Lagnes v. Green*, 282 U.S. 531, 539 (1931)]

Id. at 766.

While recognizing that there are certain exceptions, the *Williams* court affirmed the exclusive jurisdiction of the federal court to determine limitation. As recognized by the court in the *Williams* case, and as occurred here, sometimes there is a conflict between the Limitation of Liability Act and the Savings to Suitors Clause. However, the shipowner's right to limit liability and litigate the issue of exoneration and limitation in federal court is to

be protected. That is settled law. The fact that the Louisiana Direct Action Statute is involved in this case does not change these principles.

No separate cause of action is created by the direct action statute. The fact that the plaintiffs are afforded a right under the direct action statute to proceed directly against an insurer does not change the fact that the plaintiffs have but one cause of action arising from the circumstances of the case. *Cornish v. Freeman,* 451 So.2d 148 (La. App. 1 Cir. 1984), *writ denied,* 458 So.2d 476 (La. 1984). It is settled Louisiana law that a finding of no liability on the part of the insured has effect both as to the insured and the insurer. *Id.* at 151.

VII.

CONCLUSION

The Louisiana courts dismissed petitioners' direct action claims against the insurers of Zapata Haynie Corp., under principles of *res judicata,* on the basis that the federal court judgment exonerating Zapata Haynie Corp. from liability barred a direct action claim against Zapata Haynie's insurers arising out of the same factual claim. The federal court limitation proceeding involved the same parties and the same cause of action and reached a final judgment on the merits in a court of competent jurisdiction. Accordingly, *res judicata* bars any further action arising out of the same nucleus of operative facts.

This application of the rule of *res judicata* is not in conflict with any of this Court's decisions or any decisions of the U.S. appellate courts. The well settled rule of *res judicata* was applied.

The Louisiana Direct Action Statute and the Limitation of Liability Act do not come into collision. As petitioners concede, the federal court had exclusive jurisdiction to hear the limitation of liability suit filed by Zapata Haynie Corp. As petitioners further concede, the federal district court's decision exonerating Zapata Haynie Corp. from liability barred any further action against Zapata Haynie Corp. Although petitioners may wish that it did, the Louisiana direct action statute does not grant plaintiffs "two bites of the apple." The direct action statute is merely a procedural remedy. There being no further claim against Zapata Haynie, there could be no direct action claim against Zapata Haynie's insurers.

If petitioners' direct action claims against Zapata Haynie's insurer were permitted, that would ignore the well established and necessary doctrine of *res judicata.*

> Few legal doctrines are more intrinsic or necessary in our legal system than *res judicata.* That doctrine, which provides that a valid and final judgment precludes a second suit between the same parties and the same claim or any part thereof insures that litigation will come to an end.

Medina v. INS, 1 F.3d 312 (5th Cir. 1993).

It is indeed time for this litigation to come to an end, without this Court being required to review the matter. Consistent with established federal law, Zapata Haynie

Corp.'s liability was determined in federal district court pursuant to the Limitation of Liability Act and Rule F of the Federal Rules of Civil Procedure. As conceded by plaintiffs, no further claim can be brought against Zapata Haynie Corp. Consistent with well established federal and Louisiana law, any action against Zapata Haynie's insurers is barred by principles of *res judicata*. This entrenched doctrine resolves this claim. There is no unsettled federal law for this Court to resolve. Accordingly, it is respectfully submitted that this Court should deny petitioners' petition for writ of certiorari.

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